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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 359

RUBY NAFIE,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit.

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INDEX.

	Page
Prayer	1
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	4
Reasons for granting the writ	15
Conclusion	27
Appendix—Opinion of the United States Court of Appeals for the Eighth Circuit	infra 27

Cases Cited.

Alford v. U. S., 282 U. S. 687	21
Bland v. United States, 5 Cir., 299 F. 2d 105	22
Bollenbach v. U. S., 326 U. S. 607	22
Briggs v. U. S., 6th Cir., 221 F. 2d 636, 639	26, 27
Caminetti v. U. S., 242 U. S. 470, 495	25
Coppedge v. United States, D. C. Cir., 272 F. 2d 504	26
Dahly v. U. S., 8 Cir., 50 F. 2d 37, 43	17
District of Columbia v. Clawans, 300 U. S. 617	21
Gargotta v. U. S., 8 Cir., 77 F. 2d 977, 983	23
Glasser v. United States, 350 U. S. 60, 74	15
Heard v. United States, 8 Cir., 255 Fed. 829	20
International Harvester Co. v. Voboril, 8 Cir., 187 Fed. 973, 974	20

Janko v. United States, 8 Cir., 281 F. 2d 156, 366 U. S. 716 ..... 26, 27
Jencks v. United States, 353 U. S. 657, 667 20
Marshall v. United States, 360 U. S. 310 ..... 26, 27
Mayola v. U. S., 9 Cir., 71 F. 2d 65, 67 17
Minker v. U. S., 3 Cir., 85 F. 2d 425 17
Minner v. U. S., 10 Cir., 57 F. 2d 506, 611 17
Morrow v. U. S., 8 Cir., 11 F. 2d 256, 259 17
Nibbelink v. U. S., 6 Cir., 66 F. 2d 179 17
Pérez v. United States, 5 Cir., 297 F. 2d 12 22
Sealfon v. U. S., 332 U. S. 575 22
Taylor v. United States, D. C. Cir., 260 F. 2d 737 ..... 17, 18
United States v. Buffalino, 2d Cir., 285 F. 2d 408 ..... 16, 23
U. S. v. Di Re, 332 U. S. 581, 593 16
United States v. Fontana, 3 Cir., 231 F. 2d 807, 810-812 20
Walder v. United States, 347 U. S. 62 25
Wesson v. U. S., 8 Cir., 172 F. 2d 931, 936 25

Statutes Cited.

18 U. S. C. 371 3
18 U. S. C. 2113 (b) 3, 4
18 U. S. C. 4208 (a) (2) 15
28 U. S. C. 1254 (1) 2

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RUBY NAFIE,
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To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this case on June 26, 1962.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix *infra*) is not yet reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 26, 1962. A timely petition for rehearing was overruled on July 23, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

(1) Whether the evidence, *aliunde* co-conspirator Rizzo's declarations, was sufficient to connect petitioner with a conspiracy.

(2) Whether declarations of a co-conspirator were properly admitted against petitioner, when there was no evidence *aliunde* that at the time the declarations were made petitioner was connected with a conspiracy.

(3) Whether it was error for the Court to prohibit the cross-examination of the government's principal witness as to what he reported to the F. B. I. on the day of the robbery, prior to the witness learning that petitioner had been implicated by hearsay declaration of defendant Rizzo.

(4) (A) Whether, where the only evidence connecting petitioner with a conspiracy was the actual events of the robbery and hearsay declarations of an alleged co-conspirator, and where the jury after considerable deliberations made the following inquiry of the court: "Under the law of conspiracy, is it conspiracy if two parties agree to violate the law then do not violate said law," it was error for the Court to then instruct the jury that, if there is a conspiracy to commit an illegal act and if an overt act is committed by anyone in furtherance of such conspiracy, the law against conspiracy has been violated, and to refuse to repeat the other instructions favorable to the petitioner.

(B) Whether it was error for the Court to instruct the jury that it could infer guilty knowledge of petitioner if it found that she made false statements to investigating officers, where the Court further charged the jury that the government contends that petitioner made a false report as to the robbery as the only overt act done by petitioner.

(5) Whether, where the government injected into the case hearsay statements to the effect that petitioner had cashed fraudulent checks for a co-conspirator, and thereafter petitioner testified that she had never cashed a check for such co-conspirator, it was error for the Court to refuse to permit counsel for petitioner to argue an inference from the failure of the government to prove in rebuttal that she had cashed any such checks.

(6) Whether, where there had been extensive adverse and misleading newspaper publicity, and eighteen of twenty-eight members of the jury panel testified that they had read publicity concerning the case, it was error for the Court to refuse to permit the individual and separate interrogation of such eighteen jurors for the purpose of learning what they had read about the case.

STATUTES INVOLVED.

18 U. S. C. 371: If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U. S. C. 2113 (b): Whoever takes and carries away, with intent to steal or purloin, any * * * money * * * exceeding $100 belonging to * * * any bank * * * shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

STATEMENT.

The petitioner, a teller at the Mercantile Trust Company, was charged in a one count indictment with conspiring with co-defendant Rizzo to rob the bank in violation of the Bank Robbery Statute, 18 U. S. C. 2113 (b) (R. Vol. 1, pp. 1-4). The government's theory, however, was really a conspiracy to violate the Bank Embezzlement Statute, 18 U. S. C. 656. Although the robbery or embezzlement actually occurred, no one was charged with the substantive offense.

Petitioner had been a teller at the bank for about eight years (T. 353, 714). It is one of the two largest banks in St. Louis (T. 569), covering more than half a block, bounded on three sides by streets and on the other by an alley (Gov't Ex. 1), having about eighty tellers' cages on the lobby floor (T. 570).

From September to the robbery, December 2, 1960, some colored men were working about the bank remodeling it, including the installation of new elevators on the lobby floor, using restrooms, steps, elevators, doors, etc. (T. 322-331; 382-384, 471-473, 521). Indeed, on the day of the robbery, three or four colored men dressed in work clothes had been moving concrete from the alley door north of petitioner's cage to the elevator area located a few feet north of petitioner's cage (T. 521-522, 524-525, Gov't. Ex. 1). The bank employees were so accustomed to seeing the colored men, that they paid no attention to them (T. 383-384, 476).

Petitioner's cage was located in the southeast portion of the bank, called the East Lobby, in approximately the center of a row of eleven cages (T. 351, 353, 365, Gov't. Exs. 1-10). The cages are the enclosed type, of marble, to waist height, iron gratings and windows in front, and marble posts and iron gratings between each cage (T.

359, 380-381, 419-420, Gov't. Exs. 3-10), so tellers could only see customers at their own and the immediately adjoining cages (T. 382).

Defendant Rizzo had done extensive business at the Mercantile Trust Company in connection with his automobile business (T. 837-838), and had twice been to petitioner's teller's window, one of which was in her absence (T. 448-449, 453, 458, 461). Also one Charles Betscher, a criminal associate of Rizzo, whose testimony in the instant trial will be set forth *infra*, had done business at the Mercantile Trust Company (T. 229-230), and the Franklin Life Insurance Company, of which he was a General Agent, and its Regional Director had accounts there (T. 229, 384-385).

Each morning petitioner customarily drew $8,000 of money from the head teller to add to that which she retained overnight (T. 535, 541, 560, 576, 759, Gov't. Exs. 16 and 48). The bank opened for business at 9 a. m. (T. 715). During each day she turned in money to the head teller which was regarded as being in such poor condition as to be no longer useable, called bad money (T. 552, 601). She could draw money from the head teller either as used money or new money as she designated on her contra ticket, or request (T. 561, 577). On the day before the robbery she drew $8,000 in used money at the beginning of the day (T. 560-561, 716, Gov't. Ex. 18), and later drew $3,000 in used money (T. 541, 561, 717, Gov't. Ex. 14 and 19), turning in $13,692.76, or $2,692.76 more than she drew (T. 562, Gov't. Ex. 14), and retained $24,215.08 overnight.[1]

On the day of the robbery she drew her customary $8,000 early in the morning, half of which she requested

[1] The Court below erroneously stated that she received this money from the currency teller the next morning (App. 21). Although the record is not completely clear on this point, the tellers actually retained their money overnight, only rendering an accounting (T. 533).

and received in new money. All of the new money was taken in the robbery, except 43 $20 bills (T. 535, 562-563, 576-582, 715, 756), for petitioner had broken the $2,000 package of new $20 bills apart and retained almost half of them in her cage (T. 587, 589). Because she retained only part of these new $20 bills in her cage, and new bills always have consecutive serial numbers, it was possible to trace some of those taken to deposits in bank accounts of Rizzo (T. 578-582, 628, 649, 640). These deposits were made after both petitioner (T. 733) and Rizzo (T. 768) were accused by the F. B. I., thus apparently Rizzo was not aware that petitioner had retained some of the new bills in her cage.

Petitioner testified she drew some new money on December 2 because people want it for Christmas gifts (T. 718), and that she had been instructed that if a robbery occurred to give out new money (T. 731). A bank official testified that tellers had been instructed by the bank to give robbers money requested, not to endanger their lives, and the F. B. I. had given the bank a booklet and instructions, posted on the bulletin board, on what to give out in a robbery, how to do it and so on (T. 397-398).[2]

[2] Mr. Phillips, the head teller, testified that, after Rizzo had deposited the bills, 18 days after the robbery, petitioner told him that "they had been giving her a rough time," that "they say you can identify the serial numbers of those new bills" and that she "told them they were full of shit" (T. 597). Petitioner explained that the F. B. I. had questioned her every day, both in their office and her home, principally by Agent King (who, alas, did not testify); that the F. B. I. was giving her a hard time; that they began to accuse her two days after the robbery; and that the purport of her conversation with Phillips was that "they could not find any money proving anything between Mr. Rizzo and I because nothing like that had taken place" (T. 731-733). The Court below (App. 25) interprets this conversation as showing that petitioner "felt quite certain that none of the missing currency could be traced by serial numbers." We do not believe this conclusion is justified, particularly in view of the well known fact that the F. B. I. instructions also include an instruction to give out new money and petitioner's long experience in banking.

On the day of the robbery petitioner went to lunch at 10:15 and returned at 11:10 (T. 445-446, 718), during which time she did some shopping (T. 172, 718). Although the scheduled lunch hour was 45 minutes, the adjoining teller was also gone 55 minutes (T. 445-446). The adjoining cage north of petitioner was customarily vacant (T. 365) and the teller in the cage south of petitioner was at lunch (T. 367), at the time of the robbery, about 11:35 a. m. There were five or six tellers on duty in the eleven cage row of tellers in the so-called East lobby (T. 367-368, 407-408, 417-418, 431-432, 441). The only alarms were in the end cages (T. 368-369). Thus nine of the cages, including petitioner's cage, did not contain alarms.

At about 11:35 or 11:40, petitioner called to Miss Conyers who, together with Miss Eggert, was the closest teller to her, to come quick (T. 432). According to Miss Conyers, she was "real excited", and pointed to a note of pasted letters from newspapers reading "give me the money in the right draw" (T. 357-358, 412, 433, Gov't. Ex. 12); and "She started saying they said they'd kill me, they said they'd kill me" (T. 434, 438). All witnesses, including the F. B. I. agent, testified that she was very upset, crying and hysterical (T. 359, 373, 437, 438, 447, 511, 514, 617-618). Petitioner was taken to a medical room, given a sedative and put in bed (T. 375, 618, 728). The bank officials did not notify the police for some time, as they gave petitioner and the resumption of banking operations their first attention (T. 358-359, 372-374).

Later that day she was interviewed by the F. B. I. (T. 614-616, 624-625). She was also questioned, without benefit of counsel, almost every day by the F. B. I. for a period of six weeks until she was indicted (T. 171, 181, 182, 731, 732, 753); was questioned by the U. S. Attorney's Office, and forced to testify before the grand jury after the U. S. Attorney had drafted the indictment (R. Vol. 6,

pp. 18-19, 23-24, 36-37). She also testified at the trial (T. 713-765). It was conceded by government counsel that no inconsistencies in any of her many statements or testimony existed (T. 903, 904).

Petitioner's testimony and statements were that about 11:30 or 11:35 two Negroes dressed in work clothes approached her cage. The first one pushed a paper bag under the window containing silver. On pouring the contents out she discovered the note. The Negro told her to put all the money in the bag and he would kill her if she made a sound. She placed money in the bag until he told her to stop. He pulled the bag under the grate and departed to her left, or north (T. 719-725, 749-752, 614-616, 624-625). There was an alley exit door into the alley north of the lobby about 80 feet (T. 522, Gov't. Ex. 1). There were also exits north to St. Charles Street and west to Eighth Street (Gov't. Ex. 1).

The other Negro then stepped up to her cage, turning his side or back, looking north after the departed Negro toward the alley door, holding a check in his hand. After a short time he left to her right or south (T. 719-725, 749-752, 614-625). The nearest exit South was about 70 feet to Locust Street. There was also another door to Locust Street farther west (Gov't. Ex. 1). Petitioner then called Miss Conyers and told her of the robbery. She was real nervous, shaking, could hardly talk, tried to scream but couldn't (T. 725). On that day, petitioner told the F. B. I. that she thought the Negroes knew she had her larger money in the right drawer and had no alarm in her cage (T. 616).

The robbers got $15,226.00 including all the new money except the above mentioned $20 bills. Petitioner still had $18,432.93 in her cage after the robbery, mostly old money banded in lots of $500, including $5,000 in old $20 bills (T. 537-563, 564-566, 600-602, Gov't. Ex. 15).

The only person to testify who claimed to have been watching the lobby at the time of the robbery was a bank floorman, Mr. Albert Ennis, who was at his usual station (T. 350),[3] at the railing at the north end of the east lobby (T. 505-507), when at about 11:35 he saw Mrs. Marie J. Carr, a customer whom he knew, go to a counter near the center of the lobby (T. 508-509), and "thought before she went over there she might turn around so maybe she might recognize me" (T. 509). He watched her make a deposit slip, and thereafter a deposit at petitioner's cage. He then called her up to his station (T. 510, 518) where they engaged in conversation for a minute or two, as he continued facing south toward the cages (T. 510), whereupon he was notified of the robbery (T. 511, 514). When he saw the note and petitioner "hysterical and crying" he "didn't ask any more questions", for being a former policeman, he "knew what had happened", so he returned to his station (T. 511-512, 514-515). He further testified that, although there were several people in the east lobby (T. 512, 518, 520-521, 528), he didn't see any Negroes in the east lobby **at that time** (T. 513), but that earlier that day some colored people were wheeling concrete from the alley door to the elevator area under construction just north of the east lobby (T. 521-522, 524-525, Gov't. Exs. 1-10). He further testified that he did not see anyone go to petitioner's cage after Mrs. Carr (T. 519). The Court prohibited the cross-examination of Ennis as to what he reported to the F. B. I. on the day of the robbery (T. 515-517) and the facts with respect thereto will be set forth more fully in the Argument, *infra*.

Mrs. Carr testified that she entered the bank about 11:30 (T. 478). After making a deposit slip at a counter with her back to the cages (T. 478, 484), she made her deposit

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[3] There was also a floorman stationed at the south end of the lobby who did not testify (T. 350, 376).

at petitioner's cage, because all the other paying and receiving cages[4] had two or three customers (T. 485, 489). She then walked north to Ennis and engaged in conversation with him for about two minutes (T. 481-483, 486-487). At the time of the robbery she had her back to the cages (T. 482, 486, 493). Although she did not see any Negroes in the east lobby (T. 483) she wasn't paying particular attention (T. 493-495).

As the tellers place their checks in bins in the order that customers appear (T. 567), a list was made by the F. B. I. of petitioner's customers (T. 568, 619-620, 622, 729). Petitioner testified that she had five or six customers after Mrs. Carr (T. 730), most of whom were bank employees (T. 758). None of these testified nor was the list offered in evidence.

Miss Conyers, the nearest teller north of petitioner, testified that at the time of the robbery she was busy counting money, turned to the side of her cage, not observing the lobby (T. 436-437, 442-443). Miss Eggert, the nearest teller south of petitioner, did not testify, nor did any of the other tellers except Mrs. Kirt in Cage 58, four cages from petitioner. She was so far from the scene of the robbery and her vision so obstructed by the cages, that she was never questioned by the F. B. I. (T. 421-423). Just before the trial she was interviewed by the Assistant U. S. Attorney (T. 423). She had a customer at her cage and learned that the robbery had occurred on her way to check a signature (T. 411, 414, 422-423). Although she did not recall seeing any Negroes at the time (T. 412), she could not see customers at petitioner's cage (T. 421).

After the robbery one Donald Ray McGill reported to the F. B. I. that he and co-defendant Rizzo had planned a robbery of the bank (T. 291). The conversations between

[4] All cages north of petitioner were payroll and night deposit cages (T. 363-366; Gov't. Ex. 3-10).

Rizzo and McGill, who had been convicted of bank robbery, occurred in October and November, 1960 (T. 267-274, 279). McGill never met nor talked to petitioner (T. 309). Rizzo told McGill that it was to be a fake holdup involving petitioner (T. 272-274). There were to be three or four people involved (T. 292). Although McGill was to drive the getaway car, using his dealer's car (T. 291), Rizzo took him to case the bank (T. 272-274). While passing petitioner's cage, Rizzo told McGill she was the teller who would assist in the fake holdup (T. 272-273). Nothing was said to her (T. 310) and they never stopped walking (T. 274). Although McGill had never met petitioner, he recognized her from having seen her with Police Officer Carnaghi (T. 273-274, 309), her fiance. When McGill expressed concern over the fact that petitioner was going with a police officer, Rizzo replied that the policeman could be bought off if he found out (T. 274). Rizzo also instructed McGill to prepare a note from letters cut from newspapers (T. 276-277). Rizzo and McGill later mutually decided not to go through with the robbery together (T. 279).

Petitioner lived on Potomac Street about two and one-half blocks from Michael Carnaghi (who testified for the Government), an officer of the St. Louis Police Department with 11 years service (T. 161, 714). She dated Officer Carnaghi steadily and they saw each other almost every night (T. 151, 160-161, 170, 174, 734). As they planned marriage, the money she received from selling her home was placed in a joint savings account by them (T. 161, 734). Carnaghi, an officer of wide acquaintance, knew Rizzo and in late 1959 introduced him to petitioner (T. 150, 152-153, 159, 173). Soon thereafter Carnaghi persuaded petitioner to loan from their joint monies $2,000.00 to Rizzo for the purchase of the Fireplace Restaurant located about one block from her home (T. 154-155, 162-163, 174, 713, 735-736). On November 2, 1959 Rizzo exe-

cuted a note payable to both petitioner and the Officer for this amount plus interest of $200 (T. 164, 179, 735, Nafie's Ex. B). Officer Carnaghi handled the obtaining of cashier checks for Rizzo, and the collecting of checks later given them by Rizzo in payment of the note (T. 155, 163-167, 175, 180, 736-740, Nafie's Exs. A-D). When the note was fully paid, on May 19, 1960, three months late, the Officer and petitioner opened a joint savings account with the checks in the amount of $2,200.00 (T. 167-169, 738-740, Nafie's Exs. E and F). On the day of the robbery this account still contained $1,963.25 (T. 169, 741, Nafie's Ex. E). Petitioner's car was also titled jointly with Carnaghi (T. 741, 754).

Carnaghi, a Government witness, saw petitioner almost every day and was her closest confidant (T. 160-161, 169-170, 174). He saw no change in her prior to the robbery (T. 169), but she was an excitable girl and was nervous and frightened after the robbery (T. 169-170).

When off police duty, Carnaghi worked part time for a few months at the restaurant (T. 152, 156, 172, 177, 742) and he and petitioner were dinner guests of the restaurant about twice a week (T. 152, 158, 172, 742).

Betscher, who pleaded guilty to a mail fraud with Rizzo and received an 18-month sentence (T. 215, 227, 234, 251-252),[3] testified that Rizzo also suggested the plan for a phony robbery to him in September, 1960 (T. 218-222). He too was asked to drive the getaway car (T. 222), but rejected the proposition (T. 226). Mr. Betscher never met nor talked to petitioner and only saw her once from a distance at a tavern (T. 228). Just prior to the instant trial, after his plea and sentence, but at large awaiting his testimony in this case, he was arrested in Las Vegas,

[3] The Court below was in error in stating (App. 15) that he had not been sentenced at the time of the instant trial (T. 227). Rizzo was convicted and received an eight years sentence

Nevada for passing $2,400 of forged checks and $1,300 of no-account checks (T. 694, 696). When arrested he had $1,000 of new $100 bills hid between the cards in his bill fold (T. 706-709, 771-772). No one checked the numbers of these bills (T. 706, 771, 777) although the serial numbers were known of $1,000 of new $100 bills which were taken in the robbery (T. 592-593) and never found. The Assistant United States Attorney who tried this case obtained Betscher's release from the Las Vegas charges in order that he could testify in the instant case (T. 695-709, 703-704, 709, 773-779). Yet Betscher denied that he was under arrest there for writing checks (T. 246, 253-254), and said Assistant elicited from him that the F. B. I. did not arrange for his release (T. 254). He told the Las Vegas officer that, if the instant case came out all right, after he had testified, he might not have to serve his sentence (T. 694-695, 702).

One Charles Moore testified that during the first half of 1960, he was associated in business with Rizzo, and sometimes hung out at the restaurant helping out, for which he received free food and drinks. In June 1960, Rizzo threw him out (T. 185-187, 196, 198). He testified that one evening in May, 1960, petitioner had dinner at the restaurant. As business was slow both he and Rizzo sat with her. The conversation was general "and then Rizzo asked her if she would cash another one of those Franklin checks." (T. 188-189).

> "Q. What did Mrs. Nafie say to that?
>
> A. She said no, she was—she didn't want to cash anymore of those checks.
>
> Q. What else did she say?
>
> A. She said it would be easier to rob the bank."

Whereupon Moore left the table, Rizzo remaining until petitioner finished eating dinner—about 45 minutes—then she left the restaurant (T. 190). Moore never talked to

petitioner about any plan to rob the bank (T. 211). However, according to Moore, about an hour or so after petitioner left the restaurant on the above-mentioned occasion, Rizzo inquired of Moore's opinion of a plan to hold a phony robbery of the bank involving petitioner which he rejected (T. 191-193). Rizzo never mentioned the matter to him again (T. 193).

Both petitioner (T. 711-765) and Rizzo testified (T. 817-842) denying participation in the alleged conspiracy.

The case was submitted to the jury at noon and after lunch the jury retired to commence deliberations at 2 o'clock P. M. on June 14, 1961 (T. 938). At 4:10 P. M. the jury returned to the court room with the following inquiry:

> "Under the law of conspiracy, is it conspiracy if two parties agree to violate the law, then do not violate said law" (T. 939).

The Court refused to reread all the instructions on conspiracy, as requested by counsel for petitioner (T. 941), and answered the question that "if there is a conspiracy to commit an illegal act, then if an overt act is committed in furtherance of such conspiracy, if a conspiracy is found, the law against conspiracy has been violated. In other words, there must be found to be a conspiracy and also found to be an overt act in furtherance thereof. However, if a conspiracy is found and an overt act committed, it *makes no difference* who commits the overt act as long as same was done in furtherance of the conspiracy, if a conspiracy is found" (T. 944-945).

At 12:05 A. M. the next morning, June 15th, the jury returned a verdict of guilty against the defendant Rizzo (T. 948, 968) but had not agreed as to petitioner (T. 952, 953). The jury returned a verdict of guilty as to petitioner at 12:30 P. M., June 15th (T. 956). The jury

actually deliberated as to petitioner for a total of eleven hours and returned a verdict twenty-four hours after the case was submitted to it (T. 938, 947, 948, 957, 965, 966).

Petitioner was sentenced under 18 U. S. C. 4208 (a) (2) to an indeterminate sentence, with a maximum of five years imprisonment (T. 976, R. Vol. I, p. 37).

REASONS FOR GRANTING THE WRIT.

1. No one, of course, testified that he talked to petitioner about the alleged plan to rob the bank. Betscher and McGill never met her. Aside from the events at the bank, all evidence was hearsay as to petitioner, except the conversation related by Moore that she said it would be easier to rob the bank than to cash a check. We do not believe this statement, no more than a figure of speech, can be interpreted, *aliunde* Rizzo's declarations (**Glasser v. United States**, 350 U. S. 60, 74) as suggesting a robbery of the bank, as the Court below concluded (App. 29).

The events at the bank, as proved by the government, were most equivocal, and the proof not made and omitted by the Government strange indeed. It is not surprising that the bank officials failed to notice the Negroes in view of the fact that they were so accustomed to seeing them,[2] nor that Rizzo used Negroes and petitioner's cage. Rizzo knew petitioner was an excitable person and undoubtedly learned from her or her friends that there was no alarm in her cage. Nor is it strange that he told those whom he sought to induce to help that she would assist. Her closest and most intimate friend was a police officer of long service who knew practically everyone, and Rizzo had to assure that he was not told about the plan. At the best,

[2] We, of course, did not contend that Negroes working at the bank conducted the robbery. The proof was made to show why the robbers went unnoticed.

in seeking help from his criminal friends for a robbery, Rizzo was running a great risk.

Mere association, of course, does not establish conspiracy **U. S. v. Di Re**, 332 U. S. 581, 593. Further petitioner's association with Rizzo, such as it was, was derived from Officer Carnaghi and was not fully pleasant nor conducive to mutual trust.

Even assuming that petitioner's story as to the robbery was false, which was the only conduct of petitioner submitted to the jury by the government (T. 919-920), a false report does not establish conspiracy. **United States v. Buffalino**, 2d Cir., 285 F. 2d 408.

The conversation with Phillips, the head teller, seized upon by the Court below, was the natural reaction of a woman who had been constantly pummeled by the F. B. I. for eighteen days. To be sure, it is strange that the government got so little which they could use to strengthen their case from six weeks of constant questioning of petitioner, without benefit of counsel, by both the F. B. I. and the United States Attorney's Office.

We still believe that this conviction is based wholly on Rizzo's criminal gossip with his criminal associates and that the evidence is insufficient to show that petitioner participated in a robbery of the bank. This is necessary to sustain petitioner's conviction, because the only evidence of petitioner's conduct is the events at the bank. The jury's question indicates that it believed that the robbery was a real one, and that petitioner did not participate in it. Thus, though believing the robbery real, it accepted Rizzo's declarations as proof of petitioner's participation in a prior frustrated conspiracy.

2. Unless one takes the testimony of Moore, that in May, 1960, he heard petitioner state to Rizzo that it would be easier to rob the bank than cash a check, as evidence

of a conspiracy between Rizzo and petitioner, there was no evidence, apart from Rizzo's hearsay declarations, of petitioner's participating in a conspiracy, prior **in point of time** to the actual robbery itself, December 2, 1960. None of the witnesses talked to petitioner about the robbery and McGill and Betscher never met her. Even the government did not claim in its position as submitted to the jury that the conversations related by Moore were acts in furtherance of the conspiracy (T. 919-920). And Rizzo in his subsequent conversation with Moore only asked him about the proposed plan and did not state that petitioner had agreed to it (T. 192-193).

All of the extensive conversations of Rizzo with Moore, Betscher and McGill (in May, September, October and November, 1960) were admitted against petitioner over her objection (T. 191, 192, 221, 272). In this respect, since there was no evidence that a conspiracy between Rizzo and petitioner had begun or was in existence **at the time** the declarations of Rizzo were made, the decision below is in direct conflict with **Taylor v. United States**, D. C. Cir., 260 F. 2d 737, and **Nibbelink v. U. S.**, 6 Cir., 66 F. 2d 179. See, also, as to declarations made by co-conspirators before the evidence shows that the conspiracy began, **Dahly v. U. S.**, 8 Cir., 50 F. 2d 37, 43; **Morrow v. U. S.**, 8 Cir., 11 F. 2d 256, 259; **Mayola v. U. S.**, 9 Cir., 71 F. 2d 65, 67; **Minner v. U. S.**, 10 Cir., 57 F. 2d 506, 611; **Minker v. U. S.**, 3 Cir., 85 F. 2d 425.

In **Nibbelink**, Nibbelink owned an apartment building in which he permitted one Scott to use a vacant apartment. Scott printed some counterfeit notes in this apartment. Later a second press was obtained which was placed in the apartment garage where Nibbelink saw it. He then assisted in moving it to Scott's home and was present when notes were counterfeited.

Because there was admitted into evidence a declaration by Scott, prior to the acquisition of the second press, to

the effect that Nibbelink had supplied funds for the purchase of the press and that he was to have a one-fourth interest in the venture, the Court reversed, saying (6[illegible] 2d at 178-179): "All of the acts performed by the appellant * * *, occurred subsequent to the making of this declaration. The only evidence which might be said to indicate appellant's connection with the conspiracy at the time the declaration was made is the fact that Scott was then occupying a vacant room or apartment in the appellant's apartment building. This circumstance was not enough in our opinion, to authorize the admission of a declaration into evidence. Before the declarations of co-conspirators can be received in evidence against one charged with participating in the conspiracy, it must be shown by independent evidence that the conspiracy existed and that the accused was a party to it at the time the declarations were made. * * * Proof of Scott's occupancy of a vacant room or apartment in appellant's building was not a sufficient showing of this precedent condition."

Likewise in **Taylor**, Taylor, one Beecham and one Allen were charged with conspiring from March 1, 1957 to May 29, 1957 to commit lottery offenses, and with substantive counts. The conspiracy conviction as to Taylor was reversed because of the admission against Taylor of a declaration by Allen on April 19, 1957 that he was turning his numbers business over to Taylor, for the reason that there was insufficient evidence *aliunde* "to warrant a conclusion that when Allen on April 19, 1957, made the statement involving appellant Taylor, the alleged conspiracy had come into existence. The only evidence that might be said to indicate Taylor's connection with the alleged conspiracy at the time the declaration was made is the fact that on April 18, 1957, Allen was observed talking to Taylor. This was not sufficient, in our opinion, to establish the existence of a conspiracy" (260 F. 2d at 738).

We submit that Rizzo's declarations were improperly admitted against petitioner, for the reason that there was no independent evidence that she was connected with the conspiracy at the time the declarations were made. The admission of Rizzo's hearsay declarations against petitioner was highly prejudicial to her. Indeed, they were the principal basis of her ultimate conviction, for the jury's question indicated that some members of the jury had concluded that petitioner did not participate in the robbery and that it really occurred.

3. As noted in the Statement, Ennis was the only witness who claimed to have observed the cages at the time of the robbery. The only reported interview of him by the F. B. I. was conducted on December 6, four days after the robbery (Exhibit C-9), after petitioner had been implicated by the hearsay declarations of Rizzo as reported by McGill. This F. B. I. report states that Ennis did not talk to Mrs. Carr until after the robbery. On cross-examination, counsel for petitioner inquired as to what, if anything, the witness told the autorities on the day of the robbery (T. 515-516). After testifying that on that day he told the head F. B. I. agent what he knew, and that "I just told him what I just stated here a little bit ago [on direct]," counsel then asked, "Did you tell the head agent that you were standing talking to Mrs. Carr immediately prior to the report from Mr. Orlick?", whereupon the Court *sua sponte* called counsel to the bench and sternly stated (T. 517):

> "The Court: I can't let you go on. We are not concerned with what this man told the agent. We are concerned with what he saw there that day. The only purpose of such a report is, if you want to lay the foundation, if there is any statement he made which is contradictory, then you can show that. We are not at all interested in what he told the agent. However, if you have something there that is contradictory to

what he says here, then lay the foundation and bring it out and prove it, and let's proceed in that way.

Mr. Randall: Your Honor, could I explain?

The Court: I don't care for an explanation. You have no right to ask this witness what he told somebody else. If there is something that he told somebody else that contradicts what he said here, then lay the foundation and proceed the way you are supposed to do."

We, of course, had no report of the conversation, as we attempted to inform the Court, and could not lay a foundation of contradiction, and the Court was plainly wrong in its ruling. "The general rule is that the failure of a person to assert a fact, when it would have been in the natural, ordinary course for him to assert it, is evidence tending to show the non-existence of the fact." **International Harvester Co. v. Voboril**, 8 Cir., 187 Fed. 973, 974. This Court said in **Jencks v. United States**, 353 U. S. 657, 667:

> "Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatemnt, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

It has been consistently held that the defense has the right to bring out the details of an oral report of a prosecuting witness to the authorities even if a written report thereof has been admitted into evidence, and that the refusal of the Court to permit such examination is reversible error: **United States v. Fontana**, 3 Cir., 231 F. 2d 807, 810-812; **Heard v. United States**, 8 Cir., 255 Fed. 829.

Ennis was the government's principal witness and petitioner was prevented from pursuing a detailed cross-

examination as to what he reported to the authorities on the day of the robbery. The significance of such an examination is obvious. He testified that on the day of the robbery (before learning of McGill's report), upon seeing the note and petitioner in a hysterical condition, he knew a robbery had occurred because of his experience as a policeman, and returned to his station. Yet he now maintained that no robbery occurred and that no one went to her cage. Further, the F. B. I. report of the witness' statement four days after the robbery indicated that he was not talking to Mrs. Carr at the time of the robbery. If not, this fact would have affected the credibility, not only of his testimony, but also of the story given by his corroborating witness. Moreover, the Court, by preventing the laying of a foundation as to what he told the F. B. I. on the day of the robbery, also prevented us from impeaching him by calling the F. B. I. agent with whom he allegedly talked that day.

Full cross-examination of a witness is an absolute right of the party against whom such witness is called, and the Court cannot prevent adequate inquiry in fields where cross-examination is appropriate. **Alford v. U. S.**, 282 U. S. 687; **District of Columbia v. Clawans**, 300 U. S. 617.

It will not do to state, as did the Court below (App. 38), "that the trial Court was of the view that cross-examination was not being conducted in a proper manner and suggested a manner in which it could be properly conducted," because the ruling of the trial Court prohibited **any** cross-examination as to what Ennis told the F. B. I. on the day of the robbery, as there was no report thereof. As this Court said in **Alford** (282 U. S. at 692): "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination." Nor can it be said that the incident was not prejudicial. For the Court's ruling prevented petitioner from cross-examining this crucial witness as to what he told the F. B. I. on the

day of the robbery, prior to his learning that petitioner had been implicated by the hearsay report of McGill, which undoubtedly influenced his subsequent statement.[7]

4. (A) As set forth in the statement, the Court in effect instructed the jury that it could convict the defendant, even though it found that they did not commit the substantive offense. We requested that, instead of solely answering the jury's inquiry, the Court re-read all of the instructions on conspiracy (T. 941) which would have included the one to the effect that the jury must find petitioner connected with the conspiracy independent of Rizzo's declarations (T. 923). The harm inflicted on petitioner by the instruction given by the Court at this crucial time, under the evidence, was that it permitted some jurors who had concluded that petitioner did not commit the substantive offense, to convict her on the declarations of defendant Rizzo. For the only evidence independent of the substantive offense were Rizzo's declarations.

The Fifth Circuit has twice recently held that when the jury makes an inquiry of the Court for additional instructions favorable to the government, it is error for the Court to refuse to give, upon request of the defendant, instructions favorable to the defendant. **Bland v. United States**, 5 Cir., 299 F. 2d 105; **Perez v. United States**, 5 Cir., 297 F. 2d 12. Cf. **Bollenbach v. U. S.**, 326 U. S. 607, and **Sealfon v. U. S.**, 332 U. S. 575.

4. (B) As the government's position, the Court charged the jury that the government contends that petitioner and Rizzo conspired to rob the bank and that to execute the conspiracy Rizzo asked Betscher and McGill to participate therein, etc., and that Rizzo deposited some of the money

[7] This ruling should be contrasted with the Court's later instruction, requested by the government, that petitioner's statements to the authorities could be considered "as evidence of said defendant's guilty conscience" (T. 929-930).

taken in the robbery. The only mention of petitioner in this instruction, other than stating that she conspired with Rizzo, was that the government contends that her report of the robbery was false (T. 919-920). The government did not contend that she participated in the robbery, nor did it contend that her alleged conversation with Moore was an act in furtherance of the conspiracy.

The Court also charged the jury at the government's request that if it found that her report was false, such could be considered as evidence of her guilty conscience (T. 929-930). Since the events at the bank were the only evidence (other than hearsay) connecting petitioner with the alleged conspiracy, and a false report is insufficient to establish conspiracy (**Gargotta v. U. S.**, 8 Cir., 77 F. 2d 977, 983; **United States v. Bufalino**, 2 Cir., 285 F. 2d 408, 415, 417) the instruction, under the evidence, did not state an offense. Further, under the state of the evidence in this case, the instruction that the jury could find guilty conscience from a false report, in conjunction with the government's position, in effect charged the jury that petitioner could be convicted solely upon a false report.

As we pointed out in our objection (T. 936), the very heart of the issue contested at the trial was the truth or falsity of petitioner's completely consistent story, and the only purpose the instruction served was to infer that her testimony was false. The proper inquiry for the jury was not whether her story was false, but whether she had cooperated with Rizzo in the robbery of the bank, and the jury should not have been permitted to convict unless it found that she cooperated in the actual robbery.

5. Over full objections and motions, the government elicited from Moore that Rizzo asked petitioner, "If she would cash another one of those Franklin checks" and she replied that "She didn't want to cash anymore of those checks" (T. 189-190). Likewise, over the same objections

and motions, the government elicited from Betscher, the Franklin Life Insurance Agent convicted of fraud in connection with such checks (T. 215, 227, 234), that Rizzo told him that the teller (identified as petitioner) who would assist him "is the party that has cashed checks for us" (T. 223-225). On cross-examination, he testified that she had never cashed a check for him, repeating, "I said we have cashed checks" (T. 228), thus indicating that she had cashed checks for Rizzo.

Subsequently petitioner testified that she had never cashed a check for Rizzo (T. 746). On cross-examination, the government asked her if she was sure of that (T. 755), and offered no rebuttal evidence.

Government counsel in his opening argument to the jury pointed up the check matter by saying Moore testified that "he heard Ruby Nafie state that she would not handle any more checks" (T. 853). Petitioner's counsel, in answering government counsel's argument, stated (T. 870): "And [Moore] said, another check, Mrs. Nafie testified she never cashed a check for Mr. Rizzo and you can rest assured that if she had, the proof would have been in here and it wasn't here."

Government counsel objected and asked that petitioner's counsel be admonished (T. 870). We pointed out that petitioner had testified that she cashed no checks for Rizzo (T. 871). Nevertheless, the Court sustained the objection and made the following statement to the jury (T. 872): "The record may show that the objection is sustained to that statement and the jury is instructed to disregard the statement of counsel as to government's opportunity, or why didn't government bring in certain checks which counsel was referring to at that time. That has no point in this lawsuit whatsoever. The matter came up previously and was ruled upon by the Court and the Court sustained the objection of counsel and counsel will not refer to it."

Petitioner was clearly entitled to the inference which we sought to draw in our final argument. Since petitioner had testified that she had cashed no checks for Rizzo, the government was plainly entitled to prove, if it could, any such checks in rebuttal, **Walder v. United States**, 347 U. S. 62; and having failed to do so, there was an impelling inference that it could not. **Wesson v. U. S.**, 8 Cir., 172 F. 2d 931, 936. Indeed, the record justified an instruction by the Court as to such inference; exactly the opposite of what the Court did. **Caminetti v. U. S.**, 242 U. S. 470, 495.

It is no answer to say that the defense objected to injecting the alleged check matter into the case, as indeed we did. For despite our objection, the government did inject it into the case in a false and misleading manner,[8] and petitioner met it with the only evidence at her command. If the government could prove that petitioner had cashed **the** check for Rizzo, it was obliged to do so, or else be faced with an inference that it could not. By the method employed, the government was permitted to leave the impression with the jury, without proof, that petitioner had cashed some fraudulent checks for Rizzo. Indeed the Court almost said this to the jury. This was highly prejudicial to her, because of the lack of proof of any motive or need for money.

6. As shown by Nafie's motion Ex. 1, shortly prior to trial there was extensive newspaper publicity concerning this case and the fraud case of Rizzo and Betscher, some inspired by the government, some of which left false impressions in relating testimony of Betscher at the fraud trial as to what Rizzo had told him concerning petitioner

[8] There was only one check cashed at the Mercantile Trust Company (See Nafie's Motion Ex. 1 and T. 138), and the truth is that the government could not prove that petitioner's recollection that someone other than Rizzo had cashed it was false. See the examination at T. 229-231 and 384-385, and also Ex. C-4, for facts tending to corroborate her recollection.

and checks which was not in accord with the fact, and about threats allegedly made by Rizzo, all prejudicial to petitioner. The mail fraud case was tried about two months before the instant trial. Of the jury panel of 28, 18 had read articles concerning the case (T. 11). Counsel for petitioner requested permission to interrogate all the veniremen who said they had read newspaper articles separately and individually "to determine what they know about the case from that source" (T. 108). Defendant Rizzo objected to the questioning of the panel as a group about the newspaper articles "for the reason that some one of the jurors may possibly mention something concerning the past conviction of the defendant Rizzo on the charge of defrauding the insurance company" (T. 109). The request was denied (T. 110) and petitioner challenged all of the jurors who had read about the case, which also was denied (T. 110). No information as to what the jurors had read in the newspapers was elicited on the voir dire examination. At the end of the voir dire, petitioner, "in view of the fact that persons on the panel had read newspaper articles concerning this case," further moved for a transfer or in the alternative for a continuance and a mistrial, which motions were overruled (T. 26).

In **Coppedge v. United States**, D. C. Cir., 272 F. 2d 504, where prejudicial publicity occurred during the trial, the Court, in reversing, held that the trial court should have made a careful, individual examination of each of the jurors out of the presence of the remaining jurors to determine whether the articles would have any effect upon their decision, and in **Marshall v. United States**, 360 U. S. 310, the trial court did conduct a separate and individual examination of the members of the jury. In **Janko v. United States**, 8 Cir., 281 F. 2d 156, 366 U. S. 716, the Solicitor General, in his memorandum filed with this Court, noted that "Counsel's reluctance to have the jury questioned during trial may be understandable," citing **Briggs**

v. U. S., 6th Cir., 221 F. 2d 636, 639: "It could very well be that questioning the jury would be more prejudicial than helpful."

Marshall and **Janko** teach that "The prejudice to the defendant is almost certain to be as great when [prejudicial] evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence * * *. It may indeed be greater for it is then not tempered by protective procedures" (360 U. S. at 312). All practicing lawyers know that we could not seek the facts which the 18 veniremen had acquired from the papers before the rest of the panel. We do not know what knowledge they acquired from the newspapers, but the potential for harm was exceedingly great. **U. S. v. Alker**, E. D. Pa., 180 F. Supp. 661, 664. We sought the only practical course, which would have taken only a few minutes. Surely one of the forms of relief which we requested is appropriate in a situation such as this.

CONCLUSION

For the reasons stated hereinabove, we respectfully submit that the petition for writ of certiorari should be granted.

Respectfully submitted,

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OPINION.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 16,822.

August Tom Rizzo, Appellant,
vs.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

No. 16,872.

Ruby Nafie, Appellant,
vs.
United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[June 26, 1962.]

Before SANBORN and MATTHES Circuit Judges, and GRAVEN, Senior District Judge.

GRAVEN, Senior District Judge.

The appellants Ruby Nafie and August Tom Rizzo were found guilty by a jury on a one count indictment. They

appeal from the judgments of conviction entered and sentences imposed following the jury verdicts. A five-year prison sentence was imposed on the appellant Nafie; a four-year prison sentence was imposed on the appellant Rizzo. The latter sentence runs consecutively to an eight-year prison sentence imposed upon Rizzo in the case of *Rizzo v. United States* (8th Cir. 1961), 295 F.2d 638. The appellants will hereinafter be referred to as the defendants.

The indictment charged the defendants with a violation of the conspiracy statute, Section 371, Title 18, United States Code. In the indictment it was alleged that the defendants conspired to purloin or steal money from the Mercantile Trust Company of St. Louis, Missouri, in violation of Section 2113(b), Title 18, United States Code. That Section makes it a federal offense for any person to purloin or steal money from a bank whose deposits are insured by the Federal Deposit Insurance Corporation. It is undisputed that the Mercantile Trust Company was a bank whose deposits were insured by the Federal Deposit Insurance Corporation.

On December 2, 1960, the defendant Nafie was a teller in the Mercantile Trust Company of St. Louis, Missouri. Shortly after 11:30 o'clock A. M. on that day she reported that because of threats to her life she had delivered over to a colored man through her teller's window a large amount of currency. The Government's case against her and her co-defendant Rizzo is based upon the theory that the alleged holdup was a simulated holdup and that it was the product of a conspiracy between the two.

Each of the defendants makes numerous assignments of error. The indictment was returned on January 25, 1961.

Shortly thereafter each of the defendants made several pretrial motions. On February 20, 1961, the trial court heard the motions then pending. Among those motions were motions of the defendants for separate trials. Those motions were denied. The case was set for trial on March 27, 1961, at St. Louis, Missouri. On March 14, 1961, the defendant Rizzo filed a motion for a continuance of the trial. In his motion he alleged that he had recently been on trial in St. Louis on another criminal charge and that there had been extensive newspaper, television and radio publicity in connection with that trial.[1] He asked that the trial be continued until later in the year. The defendant Nafie did not make a motion for a continuance. However, she filed a statement in which she stated that she had no objection to the continuance being granted. On March 17, 1961, the trial court entered an order granting the motion. The trial of the case was then set for June 5, 1961.

On June 6, 1961, the case came on for trial. Just prior to the impanelling of the jury the defendants orally moved for separate trials. The defendant Nafie then also orally moved for a continuance and transfer of the case because of recent publicity as to the defendant Rizzo. The attorney for the defendant Rizzo stated that the latter did not join in that motion. The trial court overruled the motions for separate trials. The trial court stated that while for the present it would overrule the motion of the defendant Nafie for a continuance it would determine as the trial progressed whether cause for a continuance appeared. Twenty-eight prospective jurors were then called and sworn. The trial judge first addressed a number of questions to the members of the panel collectively. One of the

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[1] Presumably on the charge involved in the case of *Rizzo v. United States* (8th Cir. 1961) 295 F.2d 638.

questions so put was whether any of the panel recalled having read or heard anything about the case either from newspapers or over radio or television. Those who had were asked to raise their hands. Eighteen jurors held up their hands. Following this the record shows the following:

"THE COURT: Is there any member of this panel who held up their hands a moment ago that they have read or heard some news accounts of the matter on trial here? Is there any member of this jury panel who has formed an opinion from what they have read or what they have heard as to either the guilt or innocence of these defendants? If there is, would you indicate by holding up your hand, and only you would know the answer to that question.

"Let the record show no juror has indicated.

"Is there any member of this jury panel, those of you who have been sworn, to whom these questions are directed—Is there any member of this jury panel who would require, if you are selected as one of the jury, evidence to remove from your mind any thought or recollection that you may have read or heard from any newspaper or other news account of this matter? In other words, is there any member of this panel that would carry into the jury box with them any recollection which in your own mind would require you to have evidence before you would remove that recollection of evidence or that recollection of any account which you may have read or heard?

"Is there any member of this panel that feels they can not go into the jury box with an open mind, receptive mind, ready to listen and be guided only and solely by the evidence you hear and the instructions of the court? Is there any member of this panel who feels they can not do it in the trial of this lawsuit because of anything they may have read or heard concerning this case?

"The record may show no juror has indicated they can not so do."

Following the questions put to the members of the panel collectively, the trial judge examined a number of jurors individually. Following that the attorneys were given leave to conduct voir dire examination. The members of the panel were first examined individually by the attorney for the Government. They were then examined individually and at considerable length by the attorneys for the defendants. That examination included the matter of what they may have heard about the case. In the examinations the members of the panel repeatedly assured the Court and the attorneys that they had formed no opinion about the case from what they had heard and that if chosen as jurors they would decide the case solely upon the evidence presented at the trial and they would fairly and impartially decide the issues in the case.

After having examined the members of the panel on voir dire individually and at length, the attorneys for the defendants requested that they be given leave to further examine each member of the panel who had read something about the case in the newspapers individually and apart from the other members of the panel. The attorneys for the defendants were then asked by the trial judge if they wished to make any direct challenges to any of the members of the panel. The attorney for the defendant Nafie answered that he had none unless his request for further examination was denied in which event the defendant Nafie would "• • • challenge all of those who had read newspaper articles concerning the case • • •." The defendant Rizzo apparently concurred in that action of the defendant Nafie. The trial court then denied the requests for further examination under the conditions proposed. Thereafter and before the jury was sworn to try the case the defendants moved for a transfer or in

the alternative for a mistrial "* * * in view of the fact that members of the panel have read newspaper accounts concerning this case * * *." Those motions were denied. The trial judge then admonished the jury that they were not to read newspaper accounts of the case or listen to any radio and television accounts of the case and that they were not to allow their wives or husbands to tell them what was contained in such accounts. Thereafter at each recess during the trial and at the end of each day's session the trial judge admonished the members of the jury not to read any newspaper accounts of the trial and not to listen to any radio or television accounts of the trial and not to discuss the case with anyone.

During the trial the defendants prior to the commencement of each day's session, in the absence of the jury, presented to the trial judge newspapers containing accounts of the trial and asked for a mistrial. On each occasion the trial judge would make inquiry of the members of the jury as to whether they had read any newspaper accounts of the trial or heard any radio or television accounts of the trial. On each occasion it was the response of the members of the jury that they had not. The defendant Rizzo assigns error on the part of the trial court in overruling his motions for mistrial made based on newspaper articles appearing during the trial. The defendant Nafie does not make that assignment of error. The defendant Rizzo did not at the trial or since make any showing or offer to make any showing that any of the members of the jury had read any of the newspaper accounts as to the case during the trial. His assignment of error is based upon the assumption that the members of the jury disregarded the repeated admonitions of the trial judge against the reading of newspaper accounts of the trial.

In the case of *Fairmount Glass Works* v. *Cub Fork Coal Co.* (1933), 287 U.S. 474, 53 S.Ct. 252, 77 L.Ed. 439, the Court stated (p. 485 U.S.):

> "Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct.".

Our jury system is based upon assumption that juries will endeavor to follow the Court's instructions. *Delli Paoli* v. *United States* (1957), 352 U.S. 232, 242, 77 S.Ct. 294, 1 L.Ed.2d 278. Where a jury has been clearly admonished not to read newspaper accounts of the trial in which they are serving as jurors, it is not to be presumed that they violated that admonition. *State* v. *De Zeler* (1950), 230 Minn. 39, 41 N.W.2d 313, 320. Where there is no showing that any of the jurors violated the admonition of the Court not to read newspaper accounts of the trial, it is not to be assumed that as a matter of human nature they did violate the admonition. *State* v. *Sawyer* (1954), 266 Wis. 494, 63 N.W.2d 749, 756. In the case of *United States* v. *Sorcey* (7th Cir. 1945), 151 F.2d 899, certiorari denied (1946), 327 U.S. 794, 66 S.Ct. 821, 90 L.Ed. 1021, the Court stated (p. 903 F.2d): "• • • we must not permit the integrity of the jury to be assailed by mere suspicion and surmise; it is presumed that the jury will be true to their oath and conscientiously observe the instructions of the court • • •." In the present case there is not one shred of evidence that any of the members of the jury panel did, during the trial, read any newspaper accounts of the trial. The assignment of error of the defendant Rizzo in this connection has to be based upon the theory that misconduct on the part of the members of the jury was and is, to be presumed. Such is not the law. The assignment of error in question is lacking in merit.

Both of the defendants assign error on the part of the trial court because it refused to allow them to continue the voir dire of the members of the jury panel individually and alone of those who had read something about the case prior to being summoned on the panel. As heretofore noted, the defendants were given the opportunity to examine the members of the jury panel individually and at length. In those examinations the matter of their having read something about the trial was fully gone into. The defendants did not indicate what further light on that subject might have been developed by further examination.

Where during a trial it appears that members of a jury have violated the instructions of the Court in the matter of reading newspaper accounts of the trial, it is the proper practice, if not required practice, for the examination of individual jurors as to that matter to be conducted in the absence of the other jurors. An examination of jurors as to alleged misconduct because of their having, during the trial, read newspaper accounts of it in violation of their instructions presents a very delicate and troublesome situation. There is then present the possibility of punishment for misconduct. The trial then being under way, the situation is fraught with grave possibilities in the matter of mistrial. In the examination of members of a jury panel in advance of their being selected as jurors in a trial about to start the situation is different. Members of the panel who may have read newspaper accounts as to the case prior to being summoned would not be chargeable with misconduct for having done so. In the examination of the members of a jury panel, all that is involved is their qualification to serve as jurors. If on that examination it is indicated that any of the members may have heard something about the case which might

prevent them from deciding the case fairly and impartially based on the evidence in the case, such members of the panel could be directly challenged for cause and removed from the jury panel.

In few federal court criminal cases are the defendants afforded such an opportunity to examine the members of the jury panel on voir dire as was afforded to the defendants in this case. The attorneys for the defendants were allowed to conduct their own voir dire examinations and to examine the members of the panel individually and at length. The impanelling of the jury took up one entire day of the trial. The transcript of the voir dire examinations is in excess of one hundred pages in length. The matter of the members of the panel having read something about the case before being summoned was fully and extensively explored. As heretofore noted, the defendants did not make any direct challenge for cause as to any individual member of the panel. The matter of permitting the defendants to continue their voir dire examination of prospective jurors in accord with their requests was within the discretion of the trial judge. No abuse of discretion is shown.

Both defendants assign error on the part of the trial court because of its refusal to sustain their blanket challenge for cause to all of the members of the panel who had read something about the case prior to being summoned. Those assignments of error are predicated upon the theory that any member of a jury panel who may have read something about a case before being so summoned is disqualified from serving on the jury in such case.

In the recent case of *Irvin* v. *Dowd* (1961), 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751, the United States Supreme Court stated (pp. 722, 723 U.S.):

"It is not required * * * that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."

In the recent case of *Blumenfield* v. *United States* (8th Cir. 1960), 284 F.2d 46, 51, this Court stated (p. 51):

"It is clear that the mere presence of adverse publicity does not per se establish proof of prejudice, or necessarily establish that a defendant will be unable to obtain a fair trial within the district. 'The mere fact that a juror has read newspaper accounts relative to a criminal charge is not in itself sufficient grounds for excusing a juror,' *Finnegan* v. *United States*, 8 Cir., 204 F.2d 105, 110, certiorari denied 346 U.S. 821, 74 S.Ct. 36, 98 L.Ed. 347. The ultimate question is whether it is possible to select a fair and impartial jury, and the proper occasion for such a determination is upon the *voir dire* examination. * * *"

The blanket challenge of the defendants to the jury panel was properly overruled.

Closely connected with the assignments of error just referred to are the assignments of error that the defendants make in regard to their motions for transfer or con-

tinuance. It was heretofore noted that the trial judge did grant the motion for continuance made by the defendant Rizzo early in the proceedings. It was also heretofore noted that in connection with the overruling of the motion for continuance made just prior to the impanelling of the jury the trial judge stated that he would determine the need for a continuance as the trial progressed. It is well known that the voir dire examination of a jury panel is very enlightening and informative as to the need of continuing the trial of a case or transferring it. The trial judge thereafter, during the course of the trial, overruled further motions of the defendants for continuance or transfer. It is clear that the trial judge was of the view that nothing was shown in the voir dire examinations or in the course of the trial which indicated the need of continuing the case or transferring in order to afford the defendants a fair and impartial trial. The matter of continuing the trial of a case or transferring a case is one within the discretion of the trial judge. *Connelly* v. *United States* (1957), 249 F.2d 576, 584, 585, certiorari denied (1958), 356 U.S. 921, 78 S.Ct. 700, 2 L.Ed. 716. See also *Beck* v. *United States* (9th Cir. 1962), 298 F.2d 622, 628, 629, certiorari denied (June 11, 1962), . . . U.S. . . ., . . . S.Ct. . . ., . . . L.Ed. . . . The defendants have not shown any abuse of discretion on the part of the trial judge in denying their motions for continuance or transfer.

Both of the defendants assign error on the part of the trial judge in denying their motions for separate trials. The defendants were charged with conspiracy. Many conspiracy trials involve many defendants. Many conspiracy trials involve numerous events, transactions or occurrences. In the present case there are only two de-

fendants—the very minimum for a conspiracy charge. The conspiracy charged related to only one matter, which was the purloining of money from the Mercantile Trust Company by means of a simulated robbery. The case was free from the feature of multitude defendants and was factually uncomplicated. The defendants in their motions for severance set forth several reasons why they should have separate trials. The motion of the defendant Nafie for a separate trial set forth the following five grounds:

> "(1) Evidence may be introduced by the Government which may be admissible against her co-defendant but which may be inadmissible against this defendant, all to her prejudice.
>
> "(2) Evidence may be introduced by her co-defendant which would be inadmissible against this defendant in a separate trial to the prejudice of this defendant.
>
> "(3) This defendant may desire to call her co-defendant as a witness in her behalf but will be precluded from doing so at a joint trial.
>
> "(4) This defendant as well as her co-defendant will obtain a fairer and more impartial trial if she is tried alone.
>
> "(5) The jury will have insurmountable difficulty in distinguishing the alleged acts of this defendant from the alleged acts of her co-defendant."

The motion of the defendant Rizzo set forth similar grounds. Just prior to the impanelling of the jury the defendant Nafie orally renewed her motion for a separate trial and added the additional ground that the defendant Rizzo had been the subject of undesirable publicity. The trial judge overruled the motions.

The feature of certain evidence being evidence against one defendant but not against another defendant is usually

present in every joint trial. It is well settled that the fact that in a joint trial there will be evidence against one defendant which is not evidence against another defendant does not require separate trials. *Costello* v. *United States* (8th Cir. 1958), 255 F.2d 389, 395, certiorari denied (1958), 358 U.S. 830, 79 S.Ct. 51, 3 L.Ed.2d 69.

In her motion the defendant Nafie alleged that she would be prejudiced by a joint trial because of the undesirable newspaper publicity as to the defendant Rizzo. The matter of newspaper publicity was heretofore considered.

The contention of the defendants that they should have separate trials because each might desire to call the other as a witness and would be unable to do so in a joint trial subsequently became moot as each of them testified in the joint trial.

The surrounding circumstances in the present case and the evidentiary situation in the present case were not such as to make it an unusual type of conspiracy trial. The matter of granting a motion for a separate trial is a matter of discretion on the part of the trial judge. *McDonald* v. *United States* (8th Cir. 1937), 89 F.2d 128, 136, certiorari denied (1937), 301 U.S. 697, 57 S.Ct. 925, 81 L.Ed. 1352. There is nothing in the record in the present case that lends support to the claims of the defendants that the trial court abused his discretion in denying their motions for separate trials.

The defendants make numerous other assignments of error which will be considered following a consideration of the evidence.

The defendant Rizzo is a resident of St. Louis. During some of the years prior to 1959 he had been engaged in

or connected with the operation of an automobile sales agency. He had also been engaged in a freezer food plan business. In the latter part of 1959 he became connected with the operation of a bar tavern known as the Fire Place located at 3427 South Kingshighway. The defendant Nafie lived in an apartment house at 4939 Potomac, which was about a block away from the Fire Place. She was employed as a teller by the Mercantile Trust Company and had been so employed since 1953. She was a divorced woman. Michael Carnaghi was a member of the St. Louis Police Department. He had been acquainted with the defendant Rizzo for several years prior to 1959. After the defendant Rizzo commenced the operation of the Fire Place Carnaghi helped tend bar at that place and also did some maintenance work at that place. Carnaghi was separated from his wife. He resided about two blocks from the defendant Nafie. Starting in 1959 he started going steady with her. Through him she became acquainted with the defendant Rizzo. Just prior to the opening of the Fire Place, the defendant Nafie made the defendant Rizzo a loan of $2,000. That loan was made upon the suggestion and recommendation of Carnaghi. That loan was subsequently repaid.

Charles A. Betsher was one of the witnesses for the Government. He was a law school graudpate but for some years had been engaged in the insurance business. From 1957 until 1960 he was a general agent for the Franklin Life Insurance Company at St. Louis. At the time of the trial he was no longer with that company. On March 6, 1961, in the Eastern District of Missouri, he entered a plea of guilty to an indictment in which he and the defendant Rizzo were charged with devising and executing a scheme to defraud the Franklin Life Insurance Company.

The scheme involved the obtaining of policy loan checks from that insurance company and cashing them by means of forged instruments. At the time of the trial Betsher had not been sentenced. Rizzo entered a plea of not guilty. Upon trial he was convicted of the charge and his conviction was affirmed. *Rizzo v. United States* (8th Cir. Nov. 6, 1961), 295 F.2d 638. At the trial in the present case it was brought out during the examination of Betsher that he had been convicted of fraud by wire and fraud by mail and that the defrauded party was the Franklin Life Insurance Company. The details of the offense were not gone into. The matter of the conviction of the defendant Rizzo on that charge was not brought out or gone into. His appeal from that conviction was pending at the time of the trial in the present case. Betsher testified he had been acquainted with the defendant Rizzo since 1958 and had frequent contacts with him thereafter. He testified that in August, 1960, he met him in a bar tavern known as the Flaming Pit and Puppet Pub and had a conversation with him. His testimony as to that conversation is hereafter set forth with the objections and the matters relating to the objections omitted. In response to questions by the attorney for the Government, he testified, in part, as follows:

> "Q. Can you tell me what that conversation was about?
>
> A. Well, we had on occasion discussed many legitimate business deals and he had indicated he was in dire need of money and frankly, I was also in dire need of money, and he had suggested previously to this on numerous occasions, the possibility of obtaining money through a bank or what I would consider a phony bank holdup.
>
> Q. Did he go into details concerning this bank holdup or phony holdup, as you have stated?

A. Yes. • • •

• • •

Q. • • • All right, you may answer,

A. He stated that he knew a female teller at a downtown bank who would, shall we say, be in on an arrangement, whereby it would be, in his words, as simple as making a withdrawal. You walk in, you walk out with the money. One hundred fifty thousand dollars. There would be a note placed at her cage to give her adequate protection in reporting it as a holdup attempt and the—after the holdup or attempted holdup or whatever you call it was made, she would hesitate and could hesitate for any number of minutes, even an hour, to where the party involved could be back to wherever they wanted to go and have plenty of, shall we say, alibi witnesses and so on because the time of the robbery being quite important. He also indicated that the note would be either typewritten or words from newspapers or magazines clippings and the bag would merely be placed there like, you know, a normal withdrawal would be made by a depositor; that the person would just walk out with the money; that it was all pre-arranged.

Q. Now, had he described this girl or told you about the girl there that day?

A. Well, yes, because I asked him naturally how in the world anybody could arrange such a thing; and he said first of all, she is going with a policeman, she is very familiar with police work. She is well thought of in the bank, she had been there a long time. There would be no questions asked as far as she is concerned. It would be completely legitimate from beginning to end as far as the police investigation would be concerned • • •.

• • •

Q. • • • Did he make any approach to you as to what your participation would be?

A. He indicated to me that if I would merely drive the car around the block. In other words, let him out,

drive the car around the block, I would receive at least 10 per cent of the proceeds for merely being there.

Q. Now, other than that the teller had gone with a cop or a policeman, whatever he said, was there any other description * * *?

* * *

Q. * * * All right, what was said by Mr. Rizzo?

A. I asked him, is it anyone that I know, and he said, it is the party that has cashed checks for us.

* * *

Q. * * * Was there any other identification or statement of Mr. Rizzo as to who that person was?

A. Yes, sir. He said, I had seen her in his company at the Lamp Light or Lamp Lighter. It is an establishment just off of South Kingshighway.

Q. Now, do you ever recall being in the Lamp Light or Lighter Tavern?

A. Yes, in June and July and the early part of August. I had been in there, I would say, three times at the most and on this one specific occasion to which he referred, I was in there with a Brad Sallus and another gentleman and Gus [Rizzo] came over and said hello; and the table from which he came was where this party was seated along with other people, of course.

Q. Now, do you see that person in the courtroom today who was seated there?

A. Yes.

Q. Can you point her out, please?

A. It is the woman seated next to the gentleman in the blue suit.

THE COURT: The record may show he has indicated the defendant Nafie."

Charles Moore, a witness for the Government, had previously been associated with the defendant Rizzo and a brother of the latter in the freezer *food plan business*. After the defendant Rizzo commenced the operation of

the Fire Place, Moore helped out there for a while. He testified that in May, 1960, he attended a barbeque at the defendant Nafie's apartment which was also attended by the defendant Rizzo. He further testified that a short time after the barbeque the defendant Nafie came into the Fire Place for dinner. He then testified as follows:

"Q. Was she by herself?

A. She was.

Q. When she came in, can you tell me just what happened and where she went.

A. She came in for dinner and she sat down at a table.

Q. Was she sitting alone?

A. She was.

Q. Did anyone join her?

A. Gus [Rizzo] went and sat down with her at the table and * * * it was kind of slow and I sat down with her for just a few minutes.

Q. Did you hear a conversation or recall what was said at that time?

A. Well, just general conversation and then Mr. Rizzo asked her if she would cash another one of those Franklin checks.

* * *

Q. What did Miss Nafie say to that?

A. She said no, she was—she didn't want to cash any more of those checks.

Q. What else did she say?

A. She said it would be easier to rob the bank."

Donald Ray McGill testified as a witness for the Government. He testified that in 1952, at the age of eighteen, he had been convicted of bank robbery in Illinois and that he had been paroled from the sentence imposed for that crime in 1957. He testified that in the summer of 1960 he was employed by a company engaged in the retail automobile business whose place of business was near

the Fire Place and that he used to frequent that place. He testified that on one occasion he discussed his conviction of bank robbery with Rizzo. About three weeks later in October or November, 1960, at the request of Rizzo, he rode with him to the Mercantile Trust Company. Rizzo suggested that he participate in a fake holdup of the bank. He then testified, in part, as follows:

"A. He [Rizzo] said he had this teller in the bank and that she would go along with everything on a fake holdup. Word for word, he didn't say too much more about it except that there was no chance of getting caught or nothing like that. When we got to the bank * * *. He parked right in front of the bank, then we went inside the bank and just as we went inside he looked at his watch. Then we walked all the way around the bank to the far side of it and as we went by this teller's window, he indicated that was the teller.

Q. All right. At that point did you look at that window, the teller's position that he indicated?

A. Yes, sir.

Q. And the person that was in that teller's window, did you recognize her?

A. Yes, I do.

Q. Where did you recognize her from?

A. I had seen her several times getting off the bus in front of Beyers Motors and walking up Potomac and I had seen her several times in the Fire Place.

Q. When she was at the Fire Place, did you ever see her in the company of anyone or with anyone at that time?

A. I had seen her with this policeman, Mike.

Q. Mike? Do you know his last name?

A. Carnaghi; I believe.

Q. The person who was behind that window, the person you state you had seen on previous occasions, do you see her in the courtroom today?

A. Yes, I do.

Q. Will you point her out, please?

A. Right over there.

Q. All right. When you looked at this teller's cage, did you say anything to Rizzo?

A. Yes. I told him that girl goes with a policeman. I indicated to him that would be a very bad thing to get involved with someone who was going with a policeman.

Q. A little louder, please.

A. He said that the policeman didn't know anything about it and that if he found out later for enough money he would keep quiet.

Q. All right. Now from that teller's cage, what happened and what did you do?

A. We continued walking. We never did stop walking actually. We walked right out the Locust Street door, walked up the street about a block. He timed it and said it would take about three minutes to make the trip at the most. He said after we got in the car and was going back, he said it would take the police approximately seven minutes to put up a block around town and as this girl would give a phony description about colored people robbing the bank because there was work being done there.

Q. There was work being done?

A. Yes.

Q. All right.

A. He said they would look in the other end of town more than in our end of town. He also said she would scream and faint which would allow approximately five minutes."

McGill further testified that Rizzo talked to him later and suggested he make up a note to take in a bag to the Mercantile Trust Company. He then further testified as follows:

"Q. Was anything further said about this note, how the note would be given?

A. He told me that the girl would indicate to take the money out of both drawers so she would be covered if anything happened.

Q. Was there anything stated as to how this note was to be made?

A. I was to cut it out of a newspaper or magazine and paste it on paper."

McGill withdrew from the proposed scheme. It is indicated that when on December 2d, 1960, he heard about the claimed holdup of the Bank he called up the Federal Bureau of Investigation.

The Bank has numerous tellers' cages. The defendant Nafie worked at teller window No. 62. She was a paying and receiving teller. The tellers are allowed forty-five minutes for lunch. The lunch periods are alternated. One group goes to lunch at 10:15 o'clock A. M. and another group goes to lunch at 11:00 o'clock A. M. On December 2, 1960, the defendant Nafie reported for work at 9:00 o'clock A. M. Just before starting work in her teller's cage she received from and receipted to the currency teller currency in the amount of $24,215.08. During the forenoon prior to her lunch hour she received from and receipted to the currency teller for $8,000 additional currency. Included in this latter currency was $1,000 in new fifty-dollar bills and $2,000 in new twenty-dollar bills.

The defendant Nafie was among those assigned for the earlier lunch period. At that time the teller's cage on one side of her was not in use. The teller's cage on the other side of her was in charge of Maureen Hensgen who was assigned to the latter lunch period. On the day in question the defendant Nafie had with her a fairly good sized handbag. At around 10:15 to 10:20 o'clock A. M. the defendant Nafie locked up her teller's cage and went out

for lunch. She returned at around 11:10 to 11:15 o'clock A. M. Maureen Hensgen, the adjoining teller, then left for her lunch. Harriet Conyers, another teller, worked in teller cage No. 64. She returned from lunch on that day around 11:00 o'clock A. M. Shortly after 11:30 o'clock A. M. the defendant Nafie called to Harriet Conyers to come quickly. Harriet Conyers went to the defendant Nafie's cage and was informed by the latter that she had been held up. Harriet Conyers ran and told Herman Orlick, the Assistant Vice President of the Bank in charge of teller operations, of the occurrence and he came to the scene of it. Since the defendant Nafie appeared to be distraught, he called for the Bank's nurse and she was shortly taken to the nurse's quarters. Subsequently the defendant Nafie gave her version as to what had occurred. At the trial she testified that between 11:30 and 11:35 o'clock A. M. two colored men approached her teller's window. One of them put a brown paper bag in the opening in the grating. She also testified as follows in regard to the occurrence:

"Q. Then tell me what happened.

A. I poured the silver out on the counter and started to count it. I think it was mostly quarters, I am not sure, and there was a piece of paper wadded up in it and I picked up the piece of paper and I started to hand it to him and I read it. I had it open enough to read it.

Q. All right. What did it say?

A. I believe it said give me everything in the right drawer, of the righthand drawer.

• • •

Q. You say you read the note; then what happened, ma'am?

A. Well, I started putting the money in the bag.

• • •

Q. Would you tell me, would you describe as best you can recall putting the money in the bag.

A. I opened the righthand drawer and I put two or three handfuls of money in the bag. I dropped one in the drawer and picked it up and put it in again; and about that time is when he said, 'That is enough.' I took the bag and put it to the window and he jerked it through. He got his hand underneath the opening and he jerked the bag through the window.

* * *

Q. While you were putting the money in, did he say anything?

A. Well, that is just when he said give me everything and don't make a sound or I will kill you, and I thought he said something about an alarm but I didn't hear exactly what he said."

She testified that the men then left and she called to Harriet Conyers.

A check of the currency after the claimed robbery showed that $15,226 in currency was missing. The note allegedly given her in connection with the alleged robbery was made up of words cut out of magazines or newspapers.

Some construction work was going on on one of the upper floors of the Bank. Some negroes were in the employ of the contractor doing that work. It was apparently the theory of the defendants that negroes connected with the construction work staged the claimed robbery. That matter was gone into at length by the defendants in cross examination.

The Bank building was bounded on the south by Locust Street, on the north by St. Charles Street, on the west by Eighth Street, and on the east by an alley. There were entrances into the Bank lobby from Locust Street, St. Charles Street and Eighth Street. In the east lobby there

was a row of tellers' cages numbered 56 through 66. They extended north and south. Teller cage No. 66 was at the north end of that row of tellers' cages. There were numerous guards on duty during banking hours. One of those guards was Albert Ennis. He was a former member of the St. Louis Police Department. On December 2, 1960, at around 11:15 o'clock A. M., he returned from lunch. He then took up a position to the north of teller cage No. 66. He faced south so that he had under his observation the area in front of tellers' cages numbered 56 through 66. As heretofore noted, the defendant Nafie was in teller cage No. 62. Photographs of the area indicate that the construction of the tellers' cages is such that only the tellers in the very nearest cages to him could see him. Mrs. Marie J. Carr was a customer of the Bank. Ennis had formerly served in her neighborhood as a police officer and she was acquainted with him. On December 2, 1960, at around 11:30 o'clock A. M., Mrs. Carr came into the Bank to make a deposit. There was no customer at the defendant Nafie's window, so she went to that window and made a deposit. After making the deposit, Mrs. Carr walked up the lobby towards Ennis and had a short visit. While he was visiting with her he kept facing south. The alleged robbery purportedly took place shortly after 11:30 o'clock A. M. Neither Mrs. Carr nor Ennis observed any colored men in the area in front of the defendant Nafie's window at the time of the alleged robbery. The defendant Nafie testified that following the delivery of the currency one of the colored men walked to the north and the other one walked to the south. At that time a person walking to the north would walk within about five feet of Ennis. He saw no colored men go past him. Helen Kirk, who was on duty in teller cage No. 58 at around the time in question, saw no colored men in the area and did not hear any

unusual noise. Harriet Conyers, who was on duty in teller cage No. 64 at the time in question, saw no colored man or men in the area prior to the time the defendant Nafie called to her. There inheres in the verdicts of the jury the findings that the alleged robbery never occurred and that under the guise of a simulated robbery $15,226 was purloined from the Bank by the defendant Nafie.

It was not the practice of the Bank to keep a record of the serial numbers of the currency handled by it, not even of the new currency. The defendant Nafie testified she was familiar with that practice. Lester Phillips, the head currency teller of the Bank, testified that on or about December 20, 1960, he had a conversation with the defendant Nafie. He further testified that in that conversation she told him "they" had been giving her a rough time and that "they" claimed that they could identify some of the missing new bills by serial numbers and that she told them they would be unable to do so. While she did not specifically identify who she meant by "they," it could be inferred she was referring to the agents for the Federal Bureau of Investigation. Thus, it appears that the defendant Nafie felt quite certain that none of the missing currency could be traced by means of serial numbers. However, further investigation of the Bank following the alleged robbery disclosed that it was possible to determine the serial numbers of certain of the new currency receipted for by the defendant Nafie on the forenoon preceding the alleged robbery which was not in the cage following that alleged robbery. In the forenoon preceding the alleged robbery the defendant Nafie had receipted for and received $8,000 in currency. Included in that currency was a packet of new fifty-dollar bills and a packet of new twenty-dollar bills. The bills in both packets were

numbered consecutively. By checking the serial numbers of the new fifty-dollar bills and the new twenty-dollar bills still in the defendant Nafie's cage following the alleged robbery, the Bank officials were able to determine the serial numbers of new fifty-dollar bills and new twenty-dollar bills which had been receipted for by the defendant Nafie prior to the alleged robbery and which were not in the cage after the alleged robbery. The defendant Rizzo and his brother Angelo conducted their banking business at the Manchester Bank. The agents of the Federal Bureau of Investigation furnished to officials of the Manchester Bank the serial numbers of the missing new fifty and new twenty-dollar bills and asked them to check the currency deposits of the defendant Rizzo and his brother for those bills. For some time prior to October, 1960, there had been a Fire Place Restaurant account with the Manchester Bank. That account was closed around the end of October, 1960. On December 12, 1960, two accounts were opened in that Bank. One account was opened in the name of the defendant Rizzo and the other in the name of his brother, Angelo. The evidence showed that the account of Angelo was used as the account for the Fire Place Restaurant.

On December 12, 1960, Angelo Rizzo deposited with the Manchester Bank twelve of the new twenty-dollar bills taken in the alleged robbery. Four of these were deposited to his account which was used as the Fire Place Restaurant account; three were deposited in the account of the defendant Rizzo and five were used in a change transaction. On December 14, 1960, Mrs. Beulah Jones, the office girl for the Fire Place Restaurant, deposited one of the new twenty-dollar bills taken in the alleged robbery to the account of the defendant Rizzo. On December 19, 1960,

Angelo Rizzo deposited one of the new fifty-dollar bills taken in the alleged robbery to the account of the defendant Rizzo and on the same day Angelo Rizzo used two of the new fifty-dollar bills taken in the alleged robbery in making payment on a joint Bank loan that had been made to him and the defendant Rizzo. On December 20, 1960, Mrs. Jones deposited one of the new fifty-dollar bills taken in the alleged robbery to the account of Angelo Rizzo.

The defendant Nafie assigns as error the overruling of her motion for judgment of acquittal made at the close of the Government's case in chief and renewed at the close of all the evidence. She contends that there was not sufficient competent evidence to sustain the finding of the jury that she was guilty of conspiring with the defendant Rizzo to purloin money from the Bank. The defendant Rizzo assigns as error the overruling of his motion for judgment of acquittal. He contends that the evidence was insufficient to sustain his conviction.

A conspiracy may and usually has to be established by circumstantial evidence. *Isaacs* v. *United States* (8th Cir. 1962), 301 F.2d 706, 724. A common purpose and plan may be inferred from the development and a collocation of circumstances. *Glasser* v. *United States* (1942), 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680. In the case of *Goode* v. *United States* (1932), 58 F.2d 105, this Court stated (p. 107):

> "A conspiracy is rarely susceptible of proof by direct evidence, but must be proved by circumstantial evidence. It may be deduced from the conduct of the parties and the attending circumstances."

In the case of *Cooper* v. *United States* (1925), 9 F.2d 216, concerning the offense of conspiracy, this Court stated (p. 224):

> "It is practically always established by circumstantial evidence, and this method in no sense amounts to the building of one presumption upon another."

In *Smith v. United States* (1907), 157 F. 721, this Court stated (p. 728):

> "The effects and results of a conspiracy can be observed and proved but rarely can one get a glimpse or make proof of the secret conferences which inaugurate it. For these manifest reasons proof of a criminal combination to do an unlawful act can rarely be made except by light reflected from its consequences or results."

It is clear that in passing upon the question of the existence of a conspiracy the jury may consider the acts of the alleged conspirators, their individual or collective interest, their relations preceding and attending the culmination of the claimed conspiracy. In the case of *Philadelphia Storage B. Co.* v. *Kelley-How-Thomson Co.* (1933), 64 F.2d 834, this Court stated (p. 837):

> "The inferences to be gathered from a chain of circumstances depend largely upon the common sense knowledge of the motives and intentions of men in like circumstances."

The record in the present case was such that the jury could find that the circumstances hereafter referred to had been established by the evidence. The defendant Rizzo solicited Betcher and McGill to participate in a simulated robbery of the Bank. Their part was to remove with all possible dispatch from the area of the Bank money which would be purloined from the Bank by an employee thereof by means of a simulated robbery. The defendant Rizzo outlined in detail the exact manner and way in which the simulated robbery would be staged. Later a person employed by the Bank by means of simulated robbery, staged

in the exact manner and way detailed by the defendant Rizzo, did purloin money from the Bank. The defendant Rizzo shared in the fruits of the simulated robbery.[2] In addition, prior to the defendant Rizzo soliciting Betsher and McGill to participate in the simulated robbery of the Bank, in a conversation between the defendant Rizzo and the defendant Nafie relating to the subject of securing money, the defendant Nafie suggested a robbery of *the bank*. (Emphasis supplied.)

In the case of *Cramer* v. *United States* (1945), 325 U.S. 1, 65 S. Ct. 918, 89 L.Ed. 1441, the Court stated (p. 33 U.S.):

> "What a man is up to may be clear from considering his bare acts by themselves; often it is made clear when we know the reciprocity and sequence of his acts with those of others, the interchange between him and another, * * *."

In the present case the evidence was such that the jury could properly find from the "bare" facts stated that what the defendants Nafie and Rizzo were up to was to purloin money from the Bank by means of a simulated robbery.

In connection with her contention as to the claimed insufficiency of the evidence as to her, the defendant Nafie contends that the evidence aliunde of the declarations made by the defendant Rizzo in her absence was insufficient to connect her with the conspiracy. Connected with that contention is the contention that her objections to the testimony of Betsher and McGill as to the declarations made by the defendant Rizzo in her absence as to her being a party to the conspiracy were improperly overruled. It is well settled that a person cannot be connected with a con-

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[2] *United States* v. *Johnson* (2d Cir. 1958), 254 F.2d 175, 176.

spiracy solely by declarations made by an alleged co-conspirator in his or her absence. *Harlow* v. *United States* (5th Cir. 1962), 301 F.2d 361, 368. It is also well settled that in order that the declarations of an alleged co-conspirator be admissible against a defendant there must be proof aliunde of the alleged declarations of the existence of a conspiracy and the declarations must have been made pursuant to and in furtherance of the conspiracy. In the present case the testimony of Betsher and McGill as to the attempts to have them participate in a simulated bank robbery and their testimony as to the declarations made by the defendant Rizzo as to the connection of the defendant Nafie with the proposed simulated bank robbery was presented early in the trial. It is the contention of the defendant Nafie that at the time Betsher and McGill testified as to those declarations there was not sufficient evidence aliunde of the declarations of the defendant Rizzo indicating the existence of the conspiracy and that, therefore, her objections to the then testimony as to such declarations was improperly overruled in the then state of the record. It is discretionary with the trial court to admit evidence of declarations of alleged conspirators subject to later proof as to the existence of the conspiracy. *Reistroffer v. United States* (8th Cir. 1958), 258 F.2d 379, 386, 387, certiorari denied (1959), 358 U.S. 927, 79 S.Ct. 313, 3 L.Ed. 301; *Donaldson* v. *United States* (9th Cir. 1957), 248 F.2d 364, 366; Wigmore on Evidence (3d Ed. 1940), Vol. IV, Sec. 1079, p. 131. See also *Tingle* v. *United States* (8th Cir. 1930), 38 F.2d 573, where this Court stated (p. 575):

> "Mere irregularity in the order of proof is generally permissible within the sound discretion of the court, and will not constitute reversible error provided the record ultimately contains evidence which

renders competent and material that which has thus been admitted out of order."

It is the duty of the trial court to pass upon the question as to whether a sufficient prima facie showing had been made as to the existence of a conspiracy, aliunde of the declarations of an alleged co-conspirator to admit into evidence or to leave in evidence the declarations of such co-conspirator. In the present case there inhered in the rulings of the trial court the holding that a sufficient prima facie showing had been made as to the existence of a conspiracy aliunde of the challenged declarations to warrant consideration of such declarations by the jury. In the present case the trial court went further: It instructed the jury as follows:

> "You must first determine from all the evidence in the case relating to the period of time defined in the indictment whether or not a conspiracy existed. In considering whether or not a defendant was a member of the conspiracy, you must do so without regard to, and independently of, the statements and declarations of the other or others. In other words, you must determine the membership of each defendant from the evidence concerning his or her own actions, conduct, deliberations, or statements and his or her own connection with the action and conduct of others. However, once you have determined that a defendant was a member of the conspiracy, using this test, you may then consider as if made by him or her the statements, declarations and acts of other co-conspirators made in furtherance of the conspiracy during the existence thereof."

No exception was taken to that instruction.[3]

In the present case at the end of the Government's case the evidence presented by it, apart from the evidence

[3] In this connection see *Reistroffer* v. *United States*, supra, where the situation was similar.

as to declarations made by one defendant in the absence of the other, showed such a collocation of circumstances and striking parallelism of acts and conduct as to constitute a prima facie showing of the existence of a conspiracy between the two. Such collocation of circumstances and striking parallelism of acts and conduct prima facie identified the defendant Nafie as being connected with the conspiracy apart from the declarations of the defendant Rizzo that she was so connected.

The contention of the defendant Nafie that there was insufficient evidence aliunde of the declarations as to her being connected with the conspiracy made by the defendant Rizzo in her absence is not well founded.

In the case of *American Tobacco Company* v. *United States* (1946), 328 U.S. 781, 66 S.Ct. 1575, 90 L.Ed. 1575, the Court stated (p. 810 U.S.):

> "Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified."

In the present case the circumstances were such as to justify the jury in finding that a conspiracy to purloin money from the Bank had been established.

The motions of the defendants for judgments of acquittal based upon the insufficiency of the evidence were properly overruled by the trial court.

The defendant Rizzo assigns as error the overruling of his objection to certain testimony of Lester Phillips. He was the head currency teller of the Bank. He testified, as heretofore noted, that about two weeks after the simulated robbery the defendant Nafie in a conversation

with him stated that it would not be possible to identify any of the missing currency by serial numbers. The defendant Rizzo objected to that testimony and also asked the trial court to declare a mistrial because of its reception. The objection and motion were overruled. Upon overruling the objection the trial court instructed the jury, in substance, that there were two defendants and that they should keep in mind with whom conversation in question was had. If it be considered that the instruction of the trial court did not adequately limit the jury's consideration of the testimony to the charge against the defendant Nafie, no error appears for it seems clear that the testimony as to the conversation was admissible as against both defendants. The realization of the fruits of a conspiracy is an integral part of a conspiracy. In the present case the fruits of the conspiracy commenced to be realized by the defendant Rizzo starting with ten days after the simulated robbery. This early realization of the fruits of the conspiracy would tend to indicate that the conspirators were of the belief that the purloined currency could not be traced by serial numbers and that it could be safely used without fear of detection. The testimony of Lester Phillips as to the conversation in question with the defendant Nafie tended to throw light on and explain the using of the purloined money so soon after the simulated robbery. The trial court properly overruled the objection of the defendant Rizzo to the testimony in question.

Both of the defendants assign error in connection with what are referred to as the Franklin Life Insurance Company checks. It was heretofore noted that the witness Charles A. Betsher had in March, 1961, plead guilty to defrauding the Franklin Life Insurance Company by

means of forged endorsements of checks issued by the Franklin Life Insurance Company and that the defendant Rizzo had been convicted of the same offense and that his appeal from that conviction was pending at the time of the trial in the present case. After the jury had been impanelled in the present case but before any evidence was presented, the attorneys for the defendants in the absence of the jury brought up the question as to whether the Government intended to introduce into evidence in the present case any of the Franklin Life Insurance Company checks involved in the criminal case against Betsher and Rizzo. The attorneys for the defendants stated the introduction of those checks into evidence in the trial then about to start would be highly prejudicial. The attorney for the Government stated that it did not intend to introduce any of the Franklin Life Insurance Company checks into evidence. It did not introduce any of those checks into evidence. It was heretofore noted that Charles Moore testified that in May, 1960, he was present at conversation had between the defendant Rizzo and the defendant Nafie and that during that conversation the defendant Rizzo inquired of the defendant Nafie as to whether "she would cash another one of those Franklin checks" and that the defendant Nafie replied, "it would be easier to rob the bank." Both defendants objected to that testimony and asked that a mistrial be declared. The testimony that the defendant Nafie stated that "it would be easier to rob the bank" was admissible as bearing on the intent of the defendant Nafie and as indicating her state of mind. The testimony was admissible as to both defendants. It was proper for the Government to trace the growth of the conspiracy from its probable beginning. The testimony tended to throw light upon subsequent

acts of the defendants. The following is a frequently quoted statement.[4]

> "You might as well expect that one should be able to judge correctly the merits of a play, and of the motives and conduct of the actors as displayed therein by witnessing only the last scene of the last act as to expect, where the crime under investigation is part of a connected scheme, that the jury should be able to determine the motives of the defendant and judge correctly of his guilt or innocence without any knowledge of the origin of the crime, or the circumstances and motives that led up to it. The law does not blindfold courts and juries in that way, and it is always competent to show the beginning as well as the end of the criminal transaction."

The defendants also objected to the testimony as to the conversation between the two defendants because mention was made in the conversation of the Franklin Life Insurance Company checks. They moved for a mistrial. Their objections and motions were overruled. Later Charles A. Betsher testified that when he was solicited by the defendant Rizzo to participate in purloining money from the Bank the latter referred to the defendant Nafie as the bank teller "who had cashed checks for us." The defendant Rizzo objected to that testimony on the ground it brought into the case the matter of his conviction on the Franklin Life Insurance Company checks charge. The objection was overruled. In connection with the ruling the trial court stated:

> "I don't know that the witness has said anything up to this point other than it was the girl that cashed the checks for us."

The references to the Franklin Life Insurance Company checks were incidental. Under the state of the record the

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[4] *Butt v. State*, 81 Ark. 173, 181, 182, 98 S.W. 723, 726.

references were unenlightening to the jury on the matter of the commission of another crime. The assignments of error related to the rulings of the trial court in connection with the reference to the Franklin Life Insurance Company checks are not well founded. In connection with those rulings certain other rules might be noted. In the case of *Devoe* v. *United States* (8th Cir. 1939), 103 F.2d 584, certiorari denied (1939), 308 U.S. 571, 60 S.Ct. 84, 84 L.Ed. 479, the Court stated (p. 588):

> "It is elementary that in the trial of a case, whether civil or criminal, relevant and competent evidence is admissible even though it tends to prove the commission of criminal acts, not in issue, by the party against whom the evidence is offered. Where evidence of transactions between those charged to have been associated in the commission of a criminal act throws light upon the particular transaction for which they were indicted, it is admissible, regardless of the fact that it tends to implicate the defendants in the commission of other offenses."

In the case of *Bracey* v. *United States* (C.A. D.C. 1944), 142 F.2d 85, certiorari denied (1944), 322 U.S. 762, 68 S.Ct. 1274, 88 L.Ed. 1589, the Court stated (p. 88):

> "Thus, evidence of other criminal acts has been held admissible by this court when they are so blended or connected with the one on trial as that proof of one incidentally involves the other; * * *."

The defendant Nafie assigns error because the trial court sustained an objection of the Government in connection with jury argument of her attorney. The defendant Nafie testified that she had never cashed any checks for the defendant Rizzo and had never discussed the matter of cashing checks for him. In his jury argument the attorney for the defendant Nafie stated as follows:

"Miss Nafie testified she never cashed a check for Mr. Rizzo and you can rest assured that if she had the proof would have been in here and it wasn't here." The objection of the Government to that statement was sustained and the jury instructed to disregard it. The defendant Nafie assigns error based on the sustaining of the Government's objection. It was heretofore noted that prior to the presentation of evidence the defendant Rizzo, in substance, insisted that the introduction into evidence of Franklin Life Insurance Company checks would constitute prejudicial misconduct on the part of the Government and that in response thereto the attorney for the Government stated that it was not the intention of the Government to introduce any of those checks into evidence. In a hearing on the objection of the Government conducted in the absence of the jury, the trial court stated, in substance, that the attorney for the defendant Nafie had insisted that the checks in question be kept out of evidence and then sought in jury argument to raise the question as to why the Government did not put them into evidence. The trial court properly sustained the Government's objection to the argument in question.

It was heretofore noted that Albert Ennis, a bank guard, testified that at the time of the alleged robbery he was in a position to observe the area immediately in front of the defendant Nafie's teller cage and that he saw no colored man or men in that area. Upon the conclusion of his direct examination, the Government furnished the defendants with the statement made by the witness to the Federal Bureau of Investigation. He was first cross examined by the attorney for the defendant Nafie. During such cross examination he testified that following the alleged robbery he told the head agent for the Federal

Bureau of Investigation what he knew about the matter. He was then asked whether he had told that agent that immediately prior to the alleged robbery he was talking to Mrs. Carr. The trial court, in the absence of the jury, stated as follows:

> "I can't let you go on. We are not concerned with what this man told the agent. We are concerned with what he saw there that day. The only purpose of such a report is if you want to lay the foundation if there is any statement he made which is contradictory, then you can show that. We are not at all interested in what he told the agent, However, if you have something there that is contradictory to what he says here then lay the foundation and bring it out and prove it and let's proceed in that way."

The defendant Nafie assigns error on the part of the trial court in that connection. It is the contention of that defendant that the trial court unduly restricted his cross examination of the witness. It appears that the trial court was of the view that the cross examination was not being conducted in a proper manner and suggested a manner in which it could be properly conducted. The action of the trial court acting in a supervisory capacity was proper.

It is difficult to see just how the defendant Nafie could possibly have been prejudiced in any way by the action of the trial court. Ennis had testified on direct examination that at about the time of the alleged robbery he was visiting with Mrs. Carr. He also so testified on cross examination. The attorney for the defendant Nafie in his argument to the jury argued, in substance, that the fact that Ennis was visiting with Mrs. Carr was favorable to the defendant Nafie in that it cast doubt on the accuracy of his observations as to what might be occurring in the vicinity of the defendant Nafie's teller cage. If Ennis had

testified that he was not visiting with Mrs. Carr at the time, then questions tending to bring out that he was in fact visiting with Mrs. Carr at the time would have been proper and fitting. It does not appear just how it might benefit the defendant Nafie to go into the question of whether he had made statements to third parties which were in accord with that portion of his testimony which was favorable to her.

The defendant Nafie assigns error because of the giving of an instruction referred to as instruction No. 12. That instruction was as follows:

> "If you find that the defendant Ruby Nafie made statements to investigating officers regarding the matters under inquiry and pertinent thereto which were contrary to the proven facts and did so willingly and with knowledge of the falsity, you are at liberty to consider that circumstance as evidence of said defendant's guilty conscience regarding the matter under inquiry. Now what is pertinent and whether same was contrary to proven facts or done willingly and with knowledge, or whether you consider same or not, is for you as triers of the facts to determine from all the evidence before you."

The defendant Nafie excepted to the giving of that instruction. It has long been settled that the fact that a defendant has made false statements in explanation of the conduct which is the subject of a criminal charge against him is admissible as tending to indicate his guilt. *Wilson* v. *United States* (1896), 162 U.S. 613, 620, 621, 16 S.Ct. 895, 46 L.Ed. 1040; *Costello* v. *United States* (1958), 255 F.2d 389, 397, certiorari denied (1958), 358 U.S. 830, 79 S.Ct. 51, 3 L.Ed.2d 69. See also *Andrews* v. *United States* (5th Cir. 1946), 157 F.2d 723, 724. The instruction given by the trial court in this case was the same, in substance, as an

instruction approved by this Court in the case of *Costello* v. *United States*, supra. The instruction excepted to was a proper instruction.

The defendant Rizzo assigns error based upon a ruling of the trial court in connection with the cross examination of the witness Charles A. Betsher. The attorney for the defendant Rizzo during the cross examination of that witness asked him certain questions about his relations with a Jenner and a Noble. Upon objection being made by the Government to those questions, the attorney for the defendant Rizzo, in the absence of the jury, stated that he proposed to ask the witness whether he had arranged with Jenner and Noble to simulate a burglary of his home for the purpose of collecting burglar insurance and to kill his wife so that he might collect on her life insurance. The trial court sustained the objection of the Government to the proposed line of cross examination. The proposed questions were of an accusatory nature and were unsupported by any offer of proof of conviction of either of the alleged offenses proposed to be inquired about.

It is the long and well-settled Federal rule that it is not permissible to show that a witness has been arrested or accused of or charged with a criminal offense or to inquire as to such fact upon cross examination for the purpose of impairing his credibility where no conviction is shown. *Glover* v. *United States* (8th Cir. 1906), 147 F. 426. See *Echert* v. *United States* (8th Cir. 1951), 188 F.2d 337, and *Lawrence* v. *United States* (8th Cir. 1927), 18 F.2d 407. See also cases cited in 20 A.L.R.2d 1425. In the case of *Michelson* v. *United States* (1948), 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168, the Court stated (p. 482 U.S.): "Only a conviction * * * may be inquired about to undermine the trustworthiness of a witness." The assignment of error

of the defendant Rizzo based upon the ruling of the trial court in question is clearly lacking in merit.

The defendants assign error based upon the instructions given by the trial court in response to a question by the jury. This Court has reviewed the record in connection with that assignment of error and finds that it is not well founded.

The case was tried by the late Judge Randolph H. Weber. The record manifests his fairness and impartiality. The record manifests tact, patience and wisdom on his part. He handled the trial in a most able and competent manner.

The defendants had a fair and impartial trial which was free from error.

The judgments of conviction appealed from are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 16872. September Term, 1961.

Ruby Nafie,	Appellant,	Appeal from the United States District Court for the Eastern District of Missouri.
vs.		
United States of America.		

This Cause came on to be heard on the original files of the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment and sentence of the said District Court, in the cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Ruby Nafie, do surrender herself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon her, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

June 26, 1962.

Approved for the Court:

Clerk, U. S. Court of Appeals,
Eighth Circuit.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	3
Argument	9
Conclusion	16

CITATIONS

Cases:

Clune v. *United States*, 159 U.S. 590	11
Coppedge v. *United States*, 272 F. 2d 501	10
Delli Paoli v. *United States*, 352 U.S. 232	11
Glasser v. *United States*, 315 U.S. 60	10, 13
Logan v. *United States*, 144 U.S. 263	11

Statutes:

18 U.S.C. 371	3
18 U.S.C. 2113(b)	3

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 359

RUBY NAFIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-41) is reported at 304 F. 2d 810.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1962. A petition for rehearing was denied on July 23, 1962. The petition for a writ of certiorari was filed on August 22, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the selection of a jury the trial court should have ordered individual examination of each member of the jury panel who had read newspaper accounts of the case, out of the presence of the other members of the panel.

2. Whether the government adduced sufficient independent evidence of petitioner's participation in the conspiracy to render admissible against her the statements of a co-conspirator.

3. Whether the trial court erred in its instructions concerning the government's contention that petitioner made a false exculpatory statement as to the circumstances of the robbery.

4. Whether the trial court erred in halting repetitious cross-examination of a witness as to what he had told the F.B.I. agent after the incident, where there was no showing that he had made any contradictory statement.

5. Whether petitioner's counsel, after securing the exclusion of certain evidence, could properly argue that the government's failure to produce such evidence showed that it did not exist.

6. Whether, when the jury during its deliberations asked a question about conspiracy and the court gave an answer to which petitioner's counsel stated he had no objection, the court erred in not rereading all of its previous instructions on conspiracy.

STATUTES INVOLVED

18 U.S.C. 371 provides in pertinent part:

> If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

18 U.S.C. 2113(b) provides in pertinent part:

> Whoever takes and carries away, with intent to steal or purloin, any * * * money * * * exceeding $100 belonging to * * * any bank * * * shall be fined not more than $5,000 or imprisoned not more than ten years, or both;

* * * * *

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner and August Tom Rizzo were convicted of conspiring to rob the Mercantile Trust Company of St. Louis, in which petitioner was employed as a teller. Petitioner was sentenced to imprisonment for a period of five years with the right to parole at any time (R. 1-4, 30, 38). The court of appeals affirmed (Pet. App. 1-41).

I. THE INDEPENDENT EVIDENCE LINKING PETITIONER TO THE CONSPIRACY.

A. *The robbery and petitioner's version thereof.*

Petitioner was a teller at the Mercantile Trust Company in St. Louis (Tr. 347, 352-353). On De-

cember 2, 1960, she reported that, about 11:30 a.m., while the tellers at the adjoining windows were out to lunch (Tr. 353-354), she had been held up and had given considerable money away (Tr. 356). She had a note of pasted letters from newspapers which she said had been given her by the robbers (Tr. 357-358). She was in an excited state at the time (Tr. 359, 437-438). In a statement to the F.B.I., petitioner said that two negroes approached her cage and handed her a paper sack with silver. As she emptied the sack, she found the note, which the man told her to read, directing her to give him the money in the right drawer. After she had put money in the sack, the man said "that's enough." She took the sack and pushed it through the cage to him (Tr. 614).[1]

Immediately after the robbery was reported on December 2, an audit was made of the money and accounts in petitioner's cage, indicating a loss of $15,226 (Tr. 537). Petitioner that morning had signed for one hundred new $20 bills, among other money (Tr. 535, 576). The bank's new bills came from the Federal Reserve in packs of one hundred, consecutively numbered (Tr. 577). A check of the new $20 bills remaining in the cage showed that they bore serial numbers of H34368951a through H 34368975a (twenty-five bills), plus sixteen to eighteen bills from the group of twenty-five bills running the rest of the way from H34368976 through H34369000 (Tr. 580-581). It appeared that the bills whose

[1] Petitioner testified to the same effect when she took the stand at the trial (Tr. 719-722)

numbers ended in 1 to 50 of this same group had been in the original package (Tr. 582). Accordingly, an effort was made to locate in circulation the fifty $20 bills bearing the serial numbers H34368901a to H34368950a. On December 12, 1960, there were three transactions at the Manchester Bank involving the accounts of defendant Rizzo and his brother Angelo, who assisted in operating the Fire Place Restaurant. One of these was a change transaction, in which five of the missing $20 bills were turned over to the bank. Three more bills of this series were deposited to the account of codefendant Rizzo and four more were deposited to the account of Angelo Rizzo (Tr. 648-650). On December 14 one more bill of this series was deposited to the account of codefendant Rizzo (Tr. 650). In sum, thirteen of the fifty missing bills were presented by the Rizzos.

The head currency teller of the bank testified that petitioner told him, about December 20, that "they" had been giving her a rough time, claiming that the numbers on the new bills going into her cage could be identified, and that she had told them that they were wrong (Tr. 596-597).[2]

B. *Evidence Tending to Show Falsity of Petitioner's Version of the Robbery.*

Mrs. Marie Carr testified that, when she deposited a check at petitioner's window at about 11:30 o'clock, that part of the bank was not crowded and there

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[2] Petitioner testified that, so far as she knew, the bank did not note the numbers of bills that went into her cage (Tr. 763).

was nobody in line at this window. Mrs. Carr then walked over to talk with Mr. Albert Ennis, a guard whom she had known when he was on the police force. During the conversation, which lasted about two minutes, Ennis was looking south along the cages, in the direction from which Mrs. Carr had come. Mr. Ennis was called away by the reported robbery. Mrs. Clark saw no colored men while she was in the bank (Tr. 478-483). Ennis testified to seeing Mrs. Carr come in the bank, go to the desk, where she made out a deposit slip, then to petitioner's window, after which she came over and talked with him a minute or two. During all this time he was keeping the cages south of him, including petitioner's, in view. There were no colored men in this part of the bank (Tr. 508-513). Two other tellers on duty at the time testified that they saw no colored men (Tr. 427-428, 432). The testimony of the doorman at the Eighth Street door was also negative (Tr. 470).

C. *The Relationship Between Petitioner and Rizzo.*

In 1959 petitioner was introduced to Rizzo by her fiance, Mike Carnaghi, an officer on the St. Louis police force (Tr. 152-153, 735). Soon thereafter, at Carnaghi's suggestion, petitioner lent Rizzo the sum of $2,000, which he used to open the Fire Place Restaurant, a block from where petitioner lived. This was repaid, together with substantial interest, within a few months (Tr. 154-156, 162-169, 735). Carnaghi and petitioner were regular patrons at the Fire Place, where Carnaghi also worked as a maintenance man and behind the bar (Tr. 152, 158, 173, 742). Peti-

tioner and Rizzo had been guests in each other's homes (Tr. 158-159, 178-179, 188, 742-743). Rizzo, although a patron of the Manchester Bank, had on occasion come to petitioner's window at the Mercantile Trust Company (Tr. 447-448).

Early in May 1960, petitioner came into the restaurant for dinner, where she was joined by Rizzo. Charles Moore, who from time to time worked for Rizzo at the Fire Place, joined them for a short time. After some general conversation, Rizzo asked petitioner if she would cash another of those Franklin checks. Petitioner answered that she did not want to, that it would be easier to rob the bank.[3] At this point, some patrons came in and Moore left the table, but Rizzo remained for about forty-five minutes or an hour (Tr. 188-190).

II. Statements of Rizzo Linking Petitioner to Conspiracy.

Three witnesses testified to unsuccessful attempts by Rizzo to get them to join in a fake robbery of the Mercantile Trust Company. Moore testified that, after petitioner had left the restaurant on the day in May described above, Rizzo spoke to him about a "deal" involving the Mercantile Bank. Some one was to go into the bank, leave a note and hand a bag to the teller, and take the money out of the bank.

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[3] Rizzo, who testified in his own behalf, denied that such a conversation took place (Tr. 823-824). Petitioner testified that she never discussed with Rizzo the cashing of any checks and denied the conversation. (Tr. 746).

The teller was to faint, giving time to get away. The teller was identified by Rizzo as petitioner (Tr. 192-193).

The second witness was Charles Betsher, an attorney and formerly a general agent for the Franklin Life Insurance Company, who had previously been convicted of defrauding the company. He testified that on September 2 or 3, 1960, at the Puppet Pub, Rizzo told him he knew a woman teller at a downtown bank who would help them in a pretended holdup. There would be a note placed at her cage for her protection. She could hesitate as long as necessary before reporting it, so that the party taking the money could get away and be with alibi witnesses. The note would be either typewritten or made from words clipped from newspapers or magazines. The bag would be placed in the window like a normal withdrawal. He said that the girl was going with a policeman, that she was well thought of in the bank and that there would be no questions asked so far as she was concerned. He said it was the girl who had cashed checks for them, and further identified her as the girl Betsher had seen him with on a particular occasion. This girl was petitioner (Tr. 218-227).

The third witness who testified that he was approached by Rizzo was Donald McGill, a convicted

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Russ Schroeder, a match salesman, testified that between August 15 and Labor Day, 1960, he had talked to Rizzo at the Puppet Pub about buying some matches and was introduced to Betsher. Schroeder joined some friends, while Rizzo and Betsher engaged in conversation. The two were still talking when Schroeder left (Tr. 256-262).

bank robber. About two months before the robbery, Rizzo told him he had a big deal working. Later he gave a detailed description of how it would be done, by giving the teller at the Mercantile Bank a note made of words cut out of a magazine or newspaper and taking the money, following which the teller would blame it on colored men, as there were colored men doing some work at the bank. Rizzo took him to the bank and pointed out the teller, whom McGill recognized as Mike Carnaghi's girl. The "robbery" was supposed to be carried out on November 14, but McGill withdrew from the plan (Tr. 266-279).

ARGUMENT

1. The examination of the jury panel consumed an entire day. The trial judge questioned the panel collectively and individually as to the possible effect of pre-trial publicity. Thereafter, counsel pursued the matter exhaustively through questioning of the individual jurors (Tr. 4-133). Petitioner's only objection in this regard (Pet. 25-27) is that the trial court refused permission to examine each member of the panel who had read accounts of the case, separately and apart from the rest of the panel (Tr. 108-110). The reason given at the time for this request was that some member of the panel might inadvertently refer to defendant Rizzo's conviction two months earlier on charges of defrauding an insurance company (Tr. 108-109). This fear proved to be groundless, as no such mention occurred.

There was no reason to conduct a private examination of prospective jurors. The decisions dealing with publicity during trial are inapposite. If, during trial, any jurors read prejudicial accounts in the newspapers, separate examination of such jurors may be necessary, because of a possible reluctance to admit prejudice or disobedience of a court order before the other jurors. *Coppedge* v. *United States*, 272 F. 2d 504, 509 (C.A. D.C.). However, as the court of appeals here points out, there is no element of misconduct in the fact that a prospective juror has read about the case and no reason why he should be reluctant to answer frankly about the matter.

2. Independent testimony of petitioner's participation in the conspiracy established an adequate foundation for admitting against her the statements of her codefendant implicating her. Participation in a criminal conspiracy need not be proved by direct evidence. A common purpose and plan may be inferred from a "development and a collocation of circumstances". *Glasser* v. *United States*, 315 U.S. 60, 80. Here there was a close business and personal relationship between the two alleged conspirators. Petitioner had lent Rizzo two thousand dollars, with which he was able to open the Fire Place Restaurant. Petitioner was a regular visitor there and kept up a social relationship with Rizzo. On one occasion she made a statement to Rizzo which fairly permitted the inference that she was willing to participate in a robbery of the bank. Petitioner's argument that this statement was not to be taken seriously goes only to the weight of the evidence.

Nor is this all. The false report of the robbery, petitioner's belief that the bills could not be traced, and the ultimate fact that some of the missing money turned up in bank accounts held by codefendant Rizzo and his brother, all tended to implicate petitioner in the conspiracy. These circumstances, taken in conjunction with each other, justified the inference that petitioner was party to a scheme whereby money would be taken from her cage, accompanied by a false account of robbery by persons whose identity could not be determined because they had no real existence, with assurance that the money could never be traced because no record was kept of serial numbers. This was ample foundation for the admission against petitioner of statements made by a co-conspirator in furtherance of the conspiracy and prior to its termination. *Delli Paoli* v. *United States*, 352 U.S. 232, 237; *Cline* v. *United States*, 159 U.S. 590; *Logan* v. *United States*, 144 U.S. 263.

3. Petitioner complains (Pet. 22-23) that the trial judge in effect charged that her participation in the conspiracy might be deduced solely from the false report she made. The challenged instruction reads:

> If you find that the defendant Ruby Nafie made statements to investigating officers regarding the matter under inquiry and pertinent thereto which were contrary to the proven facts and did so willingly and with knowledge of the falsity, you are at liberty to consider that circumstance as evidence of said defendant's guilty conscience regarding the matter under inquiry. Now what is pertinent and whether same was

contrary to proven facts or done willingly and with knowledge, or whether you consider same or not, is for you as triers of the facts to determine from all the evidence before you.

A fair interpretation of the quoted passage does not support the claim. The judge merely says that petitioner's statements to investigating officers, if willfully false, may be taken as a "circumstance" tending to show guilty knowledge. Moreover, the instruction must be considered in context. In summarizing the government's contentions, the court also noted that the initial false report to the bank officials was charged as a part of the scheme, "in order to execute the conspiracy" (Tr. 920). If the jury so believed, clearly petitioner's agreement to feign the role of victim was evidence of her participation in the conspiracy from the outset.

4. The court did not unduly restrict petitioner's cross-examination of the guard, who was standing in the vicinity at the time the robbery was supposed to have taken place. Answering the questions of petitioner's counsel, the guard testified that he told the F.B.I. agent, whose name he did not recall, what he knew (Tr. 515). This was shortly after the incident on December 2. Petitioner's counsel continued the questioning (Tr. 516):

Q. * * * Then, on that day you told the head agent what you knew; is that correct?

A. Yes, sir.

Q. What did you tell him on that day, sir?

A. I just told him what I just stated here a little bit ago. The way I was standing there

talking to Mrs. Carr and that I was talking to her, that Mr. Orlick came out and that's all I said. I said I was standing here all the time. They were looking for colored people or they asked me if I saw any colored people and I told them, no, I didn't. That is over on the east lobby, I didn't.

Q. Did you tell the head agent that you were standing talking to Mrs. Carr immediately prior to the report from Mr. Orlick?

At this point, the court called counsel to the bench and told petitioner's counsel that they must curb this line of inquiry; that if the witness had previously stated anything contradictory to his present testimony, a foundation could be laid and that brought out (Tr. 517).

No claim is made that petitioner was denied access to the statements of this witness or any other witness to the F.B.I. These were all turned over promptly during the trial, sometimes even before a witness had testified. The trial court was acting well within its discretion in restricting repetitious questioning. See *Glasser* v. *United States*, 315 U.S. 60, 83.

5. On the first day of the trial, defense counsel told the court, out of the presence of the jury, that they would consider it highly prejudicial for the government to put in evidence certain checks used in defendant Rizzo's recent trial for fraud, because these would tend to bring his prior conviction to the attention of the jury. The government agreed not to introduce them (Tr. 137-139). Thereafter, there were incidental references to the checks during the testi-

mony of government witnesses Moore (Tr. 190) and Betsher (Tr. 223). Petitioner testified that she had never cashed a check for Rizzo (Tr. 755). Even so, the checks (which petitioner's counsel had told the court on the first day of the trial he had examined (Tr. 138)), were not introduced. At the close of the case petitioner's counsel argued to the jury (Tr. 870):

> Miss Nafie testified she never cashed a check for Mr. Rizzo and you can rest assured that if she had, the proof would have been in here and it wasn't here.

When the court, out of the presence of the jury, called counsel's attention to the fact that counsel was trying to take advantage of something which he himself had kept out of the record, counsel stated that he would not go on. The court directed the jury to disregard counsel's statement (Tr. 870-871).

In spite of his apparent acquiescence at trial in the court's ruling, counsel now urges that this was error. It is contended that, in view of petitioner's denial on the stand that she had ever cashed checks for Rizzo, the government was entitled to prove the contrary and failure to do so was a proper subject for comment. Conceivably, the government could have retreated from its commitment. However, it did not do so and petitioner's counsel at no time indicated a withdrawal from their position that the checks should be excluded. In view of the undisputed fact that the evidence was excluded at the instance of petitioner, the court's ruling was clearly correct.

6. During its deliberations, the jury asked the following question (Tr. 939):

> Under the law of conspiracy, is it conspiracy if two parties agree to violate the law then do not violate said law?

Petitioner's counsel suggested that the question should not be answered yes or no. The court agreed and read a proposed instruction in answer to the question. Petitioner's counsel asked that the court re-read its instructions on conspiracy. Codefendant Rizzo's counsel asked that the jury be told that they had heard the instructions and were bound by them (Tr. 940-942). The court then called in the jury and asked the foreman whether the jury desired a restatement or reinstruction upon the definition of conspiracy. The foreman stated that the juror who asked the question was not clear as to that one point, whether it is a conspiracy if two parties agree to violate the law and then do not violate it (Tr. 942-943). The court, after instructing the jury to apply the instructions as a whole, told them (Tr. 944-945):

> Now, bearing that in mind, bearing in mind the charge which the Court has given and answer to the question, if there is a conspiracy to commit an illegal act then if an overt act is committed in furtherance of such conspiracy if a conspiracy is found, the law against conspiracy has been violated. In other words, there must be found to be a conspiracy and also found to be an overt act in furtherance thereof. However, if a conspiracy is found and an overt act committed, it

> makes no difference who committed the overt act as long as same was done in furtherance of the conspiracy, if a conspiracy is found.

The court asked the jury as a whole if they had any further questions as to this particular matter, to which they made no response. Petitioner's counsel then stated he had no objection to the instruction (Tr. 945-946). In these circumstances there is plainly no merit in the present claim (Pet. 22).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER TERM, 1962.

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v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF.

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REPLY BRIEF.

ARGUMENT

1. The Government has ignored in its Brief in Opposition our second contention that the hearsay declaration of co-defendant Rizzo, as related by the witnesses Moore, Betscher and McGill, should not have been admitted against petitioner because there was no evidence *aliunde* that at the time Rizzo made them petitioner was associated in a conspiracy with Rizzo (Pet. 16-19). Indeed,

there was no evidence of the existence of a conspiracy at all when Rizzo made the declarations to Moore and Betscher in May and September 1960, as each of them rejected the scheme. This contention, though clearly made in the Court below, was likewise ignored there both by the Government and the Court. So that the Court may assure itself, if it desires, that we made the contention there, we are filing with the Court a copy of our brief below (See Argument II, pp 46-49), a copy of our reply brief below (See p. 3) and a copy of our petition for a rehearing below (See point 3, pp. 2-3). We believe, as did the Sixth Circuit in **Nibbelink v. United States**, 66 F. 2d 179, and the District of Columbia Circuit in **Taylor v. United States**, 260 F. 2d 737, that this is an important point of law, upon which we should somewhere get a hearing and decision. If declarations of a co-conspirator are admitted on the theory of agency (**Lutwak v. United States**, 344 U. S. 604, 617), then **Taylor** and **Nibbelink** are correct in their holdings that declarations made before the beginning of the conspiracy (as far as the proof shows) are inadmissible against a co-conspirator.

2. As the Government has chosen in its Brief to rearrange the order of our contentions, we shall assent to its wishes, and reply in the order which it has chosen.

The Government says that our fears that prejudicial newspaper publicity would be spread to the entire panel by questioning before the panel each of the 18 individual jurors who had read articles concerning what he had read (Pet. 25-27) proved groundless, as no prejudicial information was disclosed (Br. Op. 9). This was because counsel did not ask the jurors, and could not ask them, what they had read. Had we done so, of course, the prejudicial information would have been disclosed to all. Rizzo's conviction was but a small part of the prejudicial information contained in the articles, as Nafie's Motion Ex. 1

shows. The reference to his conviction was by counsel for Rizzo in objecting to such examination in the presence of the entire panel. The prejudice in the situation occurred because we were unable to find out, and did not find out, what prejudicial knowledge was possessed by each member of the panel.

3. In arguing the sufficiency of the evidence (Br. Op. 10-11), the Government makes conclusionary statements which we do not believe the record justifies (See Pet. 15-16 and Statement, Pet. 4-14). There was no "close business and personal relationship" between petitioner and Rizzo. In truth, officer Carnaghi lent the money to Rizzo. We believe that if petitioner's alleged statement, in refusing to cash a forged check, that it would be easier to rob the bank, is taken seriously, it does not implicate her in a conspiracy to rob the bank. Rather, it is an exculpatory statement. The evidence as to whether her report of the robbery was false is, to say the most, inconclusive. Further, the jury so indicated by the question it asked the Court. There was no evidence that petitioner believed that the stolen money coud not be identified, only that she did not believe Rizzo had it. The fact that the Bank did not record serial numbers of new bills is immaterial. The money was traceable, and traced, because of petitioner's own action (not that of the Bank) in breaking the package of new $20 bills apart and retaining almost half of them in her **own** cage, a fact she certainly would have known if she were in on a phoney bank robbery. When a bit of testimony like this is reared on appeal in an effort to sustain a conviction, pulled out of its context of truth, the Government is indeed grasping for straws. Certainly, no unbiased reader of this record can fail to be impressed, as was the jury, with some doubt as to the guilt of this young lady. And the record is replete with prejudicial errors.

4. The instruction as to guilty conscience being inferred from a false report must indeed be read in context with the instruction on the Government's position. As we have pointed out in our petition (Pet. 22-23), when so read it in effect charged the jury that petitioner could be convicted solely on a false report.

5. As to the trial Court's prohibiting the defense from cross-examining the Government's principal witness as to what he told the F. B. I. on the day of the robbery, before learning of Rizzo's declarations implicating petitioner (Pet. 19-22), the Court below held that all the trial Court did was to suggest a proper manner for such cross-examination. This, of course, would not do, because there was no F. B. I. report of the interview and a contradictory statement could not be first shown. So now for the first time the Government says that what the trial Court did was to restrict "repetitious questioning" (Br. Op. 13). The record (Tr. 515-517) does not sustain either justification, and this clear error was highly prejudicial.

6. It is, of course, true that the defense attempted to keep all evidence concerning the Franklin Life Insurance checks out of the case (See Pet. 23-25). But the Government injected the matter into the case over defense objections. This was not the result of "incidental references" (Br. Op. 13). For certainly the statement by Betscher was pure hearsay, not in furtherance of the alleged conspiracy, for he had never met petitioner (T. 228). It was injected into the case purposefully over extended objections (Tr. 223-225). Furthermore, both he and the Government knew it was false, for only one check had been cashed at the Mercantile Trust Company (T. 138, Nafie's Motion Ex. 1). It is ridiculous to say that petitioner attempted to place herself in an untenable position. We met the Government's evidence (admitted over

our objection) with all the evidence within our control. Mrs. Nafie's testimony that she had never cashed a check for Rizzo. Moreover, the Government opened the subject in argument by saying Moore "heard Ruby Nafie state that she would not handle any more checks" (T. 853). For the first time here, the Government now says that defense counsel acquiesced in the Court's prejudicial ruling and statement to the jury. This is indeed taking things out of context at this late date. Because the case was so thin evidencewise, and the check matter so prejudicial, we attempted to avoid as much prejudice as possible at this crucial point. But despite all our efforts, the Court in effect erroneously instructed the jury that petitioner had cashed fraudulent checks for Rizzo. In **United States v. Vintuto**, 182 F. 2d 519, 523, the Third Circuit held it to be error not to permit defense counsel to argue an inference in a very similar situation.

7. When the jury made its inquiry, we asked the Court to reread the instructions on conspiracy favorable to petitioner, and the Court clearly ruled that it would not do so (T. 941). We are not complaining about the instruction given, but about the Court's refusal to give instructions favorable to petitioner at this crucial time.

For the reasons stated in the petition and herein, we respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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